



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

INDIGENOUS LAND RIGHTS: TOWARDS RESPECT AND IMPLEMENTATION

**Report of the Standing Committee on Indigenous and
Northern Affairs**

Hon. MaryAnn Mihychuk, Chair

**FEBRUARY 2018
42nd PARLIAMENT, 1st SESSION**

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Chair**

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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has the honour to present its

TWELFTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the specific claims and comprehensive land claims agreements and has agreed to report the following:

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SUMMARY

Land is a central part of the cultures and worldviews of Indigenous peoples. However, most Indigenous communities lost access to and use of their traditional territories as a result of colonization. For many Indigenous communities, being dispossessed of their land has impeded social and economic prosperity. At issue is the way that lands and resources have been “mismanaged, sold, [and] degraded, often while communities faced poverty and struggled to secure even the most basic necessities of life.”¹ Redress for historical injustices is a key element in advancing reconciliation; settling claims also provides benefits to Indigenous communities in relation to self-determination and economic development.

Over time, the federal government developed policies and processes to address injustices related to Canada’s breach of legal obligations under pre-1973 treaties and the way Canada managed First Nations funds and assets (specific claims). The federal government also developed policies and processes to deal with Indigenous land rights that were not addressed in past treaties or other legal means (comprehensive land claims).

The House of Commons Standing Committee on Indigenous and Northern Affairs (the Committee) believes that getting the claims process right is an important part of reconciliation. As such, the Committee agreed in the spring of 2017 to study the current processes for settling specific and comprehensive claims, as well as to identify challenges, benefits and outcomes for Indigenous communities. The Committee is aware that these issues have been studied before, and that Indigenous groups have repeatedly voiced their concerns and recommended reforms, often leading to little or no change.

During its study, the Committee heard that Indigenous groups across Canada are frustrated and find the current claims processes expensive, time-consuming and adversarial. It takes on average 18 years to settle a comprehensive land claim²; the process is fraught with delays and creates a significant financial burden for Indigenous communities. Further, Indigenous communities indicated that even when an agreement is reached, Canada does not always fulfill its treaty obligations.

With regard to specific claims, the Committee heard that the process is adversarial, does not take into account Indigenous cultures, values and laws, lacks independence and

1 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

2 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild)

transparency and that funding for research and participation in the process is insufficient and unpredictable. Indigenous communities further expressed concerns over the very premise of the specific claims process, stating that it is “re-victimizing those who were wronged by Canada’s past actions.”³

While some witnesses were critical of the claims processes, others acknowledged that there was often some creativity at the negotiation table⁴ to resolve claims and that “Canada in recent years has demonstrated that it is prepared to be flexible and creative in addressing the interests of Indigenous groups outside of the treaty process.”⁵ Nonetheless, it is clear to the Committee that in its current form, the government’s policies and processes prevent Indigenous communities from achieving a fair resolution of their claims. Further, the Committee found that the current processes cannot efficiently achieve the goals set by the federal government, as evidenced by the high number of unresolved claims.

The starting point for any reframing of Canada’s specific and comprehensive land claims policies must be for equal partners to acknowledge Aboriginal rights, and to focus on rebuilding trust. As such, the Committee makes several recommendations, and recommends that their implementation be guided by the Principles and Minimum Standards set out in the United Nations Declaration on the Rights of Indigenous Peoples (Recommendation 17). These recommendations include that Canada:

- Adopt a holistic and flexible approach rooted in the recognition of rights for the resolution of comprehensive claims (Recommendation 1);
- Make information on Recognition of Rights Tables publicly available and report to Parliament on their progress (Recommendation 2);
- Recognize that land claims agreements are living documents (Recommendation 3);
- Work in partnership with Indigenous peoples to reform the funding models for the specific claims, comprehensive claims, Treaty Land Entitlement and Additions to Reserve processes, including the forgiveness of all outstanding loans (Recommendations 4, 5 and 6);

3 [Brief](#) presented by Mishkosim�iibiing (Big Grassy) First Nation, 19 October 2017.

4 INAN, [Evidence](#), 29 September 2017, 0920 (Chief R. Donald Maracle).

5 INAN, [Evidence](#), 26 October 2017, 1220 (Mr. Donald Eyford).

- Make dispute resolution mechanisms available to Indigenous communities throughout the negotiation of comprehensive land claims (Recommendation 7);
- Develop processes and create an independent office to monitor the implementation of comprehensive land claims and specific claims agreements, and support Indigenous community-led data collection (Recommendations 8 and 9);
- Reform the specific claims policy and amend the *Specific Claims Tribunal Act* to, among other matters, incorporate First Nations cultures, knowledge and language where possible (Recommendations 10 and 11);
- Develop a funding framework that provides sufficient funding for the research and development of specific claims (Recommendation 12);
- Improve the Treaty Land Entitlement and Additions to Reserve processes (Recommendations 13 and 14);
- Develop an improved process for educating and engaging third parties and local communities members at every stage of the land claims processes (Recommendation 15);
- Develop a mandatory education and training program for officials working on claims and launch a public education campaign for all Canadians. (Recommendation 16).

While true reconciliation requires more than the actions outlined in this report, the Committee hopes that these recommendations provide guidance to the federal government in its efforts to reform the specific and comprehensive land claims processes in partnership with Indigenous peoples. The Committee further hopes that these recommendations contribute not only to a renewal of claims policies and processes, but to a renewed relationship with Indigenous peoples.

LIST OF RECOMMENDATIONS

As a result of their deliberations, committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That Indigenous and Northern Affairs Canada adopt a holistic approach to comprehensive claims resolution that emphasizes community success and sustainability. That in support of this new approach, Indigenous and Northern Affairs Canada work in partnership with Indigenous peoples to reform how it establishes negotiation mandates to reflect the fact that an agreement should represent a framework that is rooted in a recognition of rights approach for a renewed and on-going relationship between the Crown and Indigenous peoples. This new approach should include, but not be limited to:

- **Continuing to implement a flexible approach for the development of negotiation mandates, which reflects and reinforces the results of the discussions with impacted parties at rights and recognition tables, in addition to recognizing that a one-size-fits-all policy for the country will not work;**
- **Broadening discretion for negotiators in their mandates to better facilitate reaching consensus, reduce unnecessary delay and promote reconciliation; and**
- **Ending the practice of requiring Indigenous rights holders to agree to extinguish their inherent and/or treaty rights as a prerequisite for an agreement as this fails to reflect both the on-going nature of the renewed relationship and the recognition of rights approach. 55**

Recommendation 2

That Indigenous and Northern Affairs Canada make information on Recognition of Rights Tables publicly available, including the policy and focus of the discussions, and that Indigenous and Northern Affairs Canada provide information to Indigenous communities on how to form a Recognition of Rights Table and provide a report to Parliament within three years on their progress. 56

Recommendation 3

That Indigenous and Northern Affairs Canada recognize that land claims agreements are living documents and that the comprehensive land claims process be recognized as an ongoing relationship moving towards reconciliation. 57

Recommendation 4

That Indigenous and Northern Affairs Canada work in partnership with First Nations to reform the funding model for the specific claims process to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven. 58

Recommendation 5

That Indigenous and Northern Affairs Canada work in partnership with Indigenous peoples to reform the funding model for the comprehensive claims process to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven..... 58

Recommendation 6

That Indigenous and Northern Affairs Canada work in partnership with Indigenous peoples to reform the funding model for the Treaty Land Entitlement and Additions to Reserve processes to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven..... 58

Recommendation 7

That Indigenous and Northern Affairs Canada make binding arbitration, mediation, and other alternative dispute resolution mechanisms available to Indigenous communities within the comprehensive land claims process. 59

Recommendation 8

That Indigenous and Northern Affairs Canada develop a tracking system to ensure commitments made by the Government of Canada in comprehensive land claim or specific claim agreements are clearly documented, the progress regularly reviewed, and promptly implemented; and that an independent office be created to monitor implementation. 60

Recommendation 9

That Indigenous and Northern Affairs Canada work with the relevant provincial and/or territorial governments and Indigenous signatories to support Indigenous community-led data collection, with a focus on using this data to improve and accelerate the implementation of specific and comprehensive land claim agreements, and to hold government accountable for implementation of these agreements. 61

Recommendation 10

That Indigenous and Northern Affairs Canada broaden the criteria considered when accepting or rejecting a claim for negotiation and implement policies to improve communication and transparency in the assessment phase of the specific claims process, and that an independent body for the review and assessment of specific claims be considered. 64

Recommendation 11

That Indigenous and Northern Affairs Canada, in partnership with First Nations, reform the specific claims policy and where applicable amend the *Specific Claims Tribunal Act* to:

- **Incorporate First Nations cultures, knowledge and languages in the specific claims policy and process, where possible;**
- **Ensure First Nations are provided with information regarding their claims and rationale for decisions made at all stages of the specific claims process;**
- **Ensure First Nations are involved and appropriately supported in determining the value of their specific claim(s);**

- Review and broaden the criteria in the financial formula that Indigenous and Northern Affairs Canada uses to determine an appropriate offer of settlement, including a review of the 80/20 rule and increased use of land transfers as compensation;
- Expand the eligibility criteria for specific claims to include claims based on the non-fulfilment of treaty rights;
- Review the 150 million dollar maximum compensation cap for claims resolved through the Specific Claims Tribunal..... 64

Recommendation 12

That Indigenous and Northern Affairs Canada immediately work with First Nations communities and specific claim research organizations to develop a funding framework that provides sufficient funding for the research and development of specific claims and that the department ensure stable, predictable and long-term funding going forward..... 65

Recommendation 13

That Indigenous and Northern Affairs Canada, with regard to all Treaty Land Entitlement or Additions to Reserve lands, ensure First Nations have access to dispute resolution mechanisms and resources to negotiate and plan with municipalities (land use, urban reserves, road building and service agreements) and third party interests (conversion of land to reserve status)..... 66

Recommendation 14

That Indigenous and Northern Affairs Canada increase funding and resources to support environmental assessments, surveys and necessary federal activities to conclude the Additions to Reserve process in a timely manner. 66

Recommendation 15

That Indigenous and Northern Affairs Canada develop an improved process for educating and engaging third parties and local community members at every stage of a comprehensive or specific claim. 67

Recommendation 16

That Indigenous and Northern Affairs Canada work with the Indigenous communities and organizations to develop a mandatory education and training program for all officials working on specific claims, comprehensive land claims, and self-government agreements; and that Indigenous and Northern Affairs Canada launch a public education campaign to educate all Canadians on the importance of the land claims process in reconciling harms that have resulted throughout Canadian history through the expropriation of traditional land, the unfulfillment of treaty commitments, and a policy of assumed crown sovereignty. 68

Recommendation 17

That the Government of Canada, in implementing the preceding recommendations and proposed initiatives, be guided by the Principles and Minimum Standards set out in the United Nations Declaration on the Rights of Indigenous Peoples. 68



INDIGENOUS LAND RIGHTS: TOWARDS RESPECT AND IMPLEMENTATION

INTRODUCTION

A. Introduction

The House of Commons Standing Committee on Indigenous and Northern Affairs (the Committee) adopted two motions in 2017 to study and report on specific claims, comprehensive land claims and self-government agreements. Whereas specific claims address injustices stemming from “Canada’s obligations under historic treaties or the way it managed First Nation funds or assets,”¹ comprehensive land claims cover Indigenous land rights that “have not been dealt with by treaty or through other legal means.”² Currently, there are 407 specific claims either under assessment or in negotiation, and 46 comprehensive land claims in negotiation. Comprehensive land claim negotiations may also include self-government provisions. However, this is not always the case as Indigenous communities can negotiate stand-alone self-government agreements.

Since their adoption, claims and self-government policies have given rise to concern and criticism on the part of Indigenous peoples. In order to contribute to the positive renewal of these policies, the Committee is presenting this report, which consists of two parts. The first part, summarizing what the Committee heard, contains four chapters. The first chapter presents a general overview of the situation, the benefits sought through claims settlement and general concerns raised by witnesses. The second chapter discusses specific claims and concerns raised by witnesses regarding the funding of the process, assessment, negotiation and settlement of claims, as well as the Specific Claims Tribunal. The third chapter examines comprehensive land claims and issues raised by witnesses, including the terminology of land claims, the length of negotiations, the concept of certainty, the extinguishment of rights, and the implementation of agreements. The fourth chapter discusses self-government and its impacts, as well as funding arrangements for implementation. Following the in-depth analysis of the testimony and briefs, the Committee developed a series of practical recommendations, which are presented in the second part of this report.

1 Indigenous and Northern Affairs Canada (INAC), *Specific Claims*.

2 INAC, *Comprehensive Claim*.



B. Committee mandate and process

On 21 February 2017, the House of Commons Standing Committee on Indigenous and Northern Affairs adopted the following motion to undertake a study on comprehensive land claims and self-government agreements:

That, pursuant to Standing Order 108(2), the next study the Committee undertake, following the Committee's study on the Department of Indigenous and Northern Affairs' Default Prevention and Management policy, be a study of comprehensive land claims agreements, also known as "modern treaties," and self-government throughout Canada; the current processes being used across Canada and how they are currently being executed; the comparative benefits and challenges of different approaches to negotiations; the outcomes and impacts for Indigenous communities who have signed comprehensive land claims agreements; and that the Committee report its findings to the House of Commons.

On 9 May 2017, the Committee adopted a second motion, agreeing to expand its study to include specific claims and federal policies governing comprehensive and specific claims.

As part of its study, the Committee held 10 public meetings during which it heard 89 witnesses including Indigenous communities, organizations, and governments, federal and territorial governments, and specific claims research organizations, among others. Half of these public meetings were held outside of Ottawa in locations including Delta, British Columbia; Winnipeg, Manitoba; Quebec City, Quebec; Belleville, Ontario; and Yellowknife, Northwest Territories. The Committee received over 20 briefs from individuals, Indigenous communities and organizations, and governments. The Committee wishes to express its gratitude to all witnesses who participated in this study and shared their experiences with us. The important contributions of witnesses allowed the Committee to understand the benefits and challenges of comprehensive land claim and specific claims processes for Indigenous communities. Further, the Committee is thankful for the gracious hospitality of the First Nations communities, who welcomed us warmly to their territories during community site visits.

PART ONE: WHAT THE COMMITTEE HEARD

CHAPTER ONE: CLAIMS SETTLEMENT FRAMEWORK

A. Introduction

To fully understand the relevance of this study on specific claims and comprehensive land claims, it must be viewed within the context of Canada's commitment to reconciliation and to the renewal of its relationship with Indigenous peoples. According to Wayne Wysocki of the Ghotlenene K'odtineh Dene, this renewal of the relationship "must be a nation-to-nation relationship, based on recognition, rights, respect, co-operation, and partnership."³

Although not all Indigenous groups participate in the claims process for the same reasons, there seemed to be some consensus among witnesses that the current process does not always aim to rebuild the relationship. As Grand Chief Constant Awashish explained, "reconciliation implies recognizing mistakes."⁴ If Canada is serious about correcting the wrongs it has done, it will have to acknowledge its past mistakes and the shortcomings of its current policies.

Many witnesses described the calls to action by the Truth and Reconciliation Commission and the articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as tools to help move toward a new relationship between Canada and Indigenous peoples. For example, under article 27 of the UNDRIP, states must "establish and implement ... a fair, independent, impartial, open and transparent process ... to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources." Witnesses also cited article 37 of the UNDRIP:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.⁵

3 House of Commons, Standing Committee on Indigenous and Northern Affairs (INAN), *Evidence*, 27 September 2017, 1055 (Wayne Wysocki).

4 INAN, *Evidence*, 28 September 2017, 0810 (Grand Chief Constant Awashish).

5 United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*.



The Committee supports Canada and Indigenous peoples in their journey toward reconciliation. This report provides insight and recommendations to help the government make the policies and processes on specific claims and comprehensive land claims more just, fair and inclusive. The Committee believes that this will contribute to reconciliation and a renewed relationship with Indigenous peoples. This chapter begins with a summary of what the Committee heard about the benefits of settling claims – self-determination and economic development – and fundamental concerns that Indigenous peoples have about the processes.

B. Benefits of claims settlement

To the Nisga'a Lisims Government, the treaty concluded with Canada was a “book of opportunities” that defined the relationship with the federal and provincial governments.⁶ However, Indigenous communities are unique, each with their own historical, cultural and socio-economic circumstances. This diversity is reflected in the claims process, as each Indigenous community has its own unique reasons for negotiating with Canada. Therefore, while treaties are “books of opportunity,” they do not all tell the same story. This section is therefore a summary of the opportunities and benefits identified by Indigenous communities, governments, and organizations who participated in this study. For many Indigenous communities, settling these claims is a matter of “legal, economic, and cultural survival.”⁷

a. Self-determination

Witnesses stressed that Indigenous peoples have largely been excluded from Canada’s socio-political development. They explained that they were “not part of the whole nation-building process when Canada was founded.”⁸ According to several witnesses, the claims process can provide the opportunity to manage their own affairs. Speaking on behalf of Inuit, Natan Obed explained:

We want to create this shared country and shared space with you and with the federal government, provinces, and territories, but we want to do it as part of an evolving Inuit democracy. There is a space in Confederation for Inuit, and land claim agreements are part of the framework of that relationship. I do hope that we can find a way to make Canada recognize this relationship in the space that we already have.⁹

6 INAN, *Evidence*, 25 September 2017, 1215 (Corinne McKay).

7 INAN, *Evidence*, 26 October 2017, 1110 (Chief Wayne McKenzie).

8 INAN, *Evidence*, 29 September 2017, 0840 (Luke Hunter).

9 INAN, *Evidence*, 24 October 2017, 1210 (Natan Obed).

The message conveyed by several witnesses is one of self-determination. Settling claims is an opportunity for Indigenous peoples to develop their full potential and gain a new level of pride about “who [they] are as Indigenous peoples within Canada or the world.”¹⁰ In addition to giving Indigenous people the power to be in control of their own destiny, settling claims could improve the quality of services within their communities.¹¹ For example, Eleanor Bernard explained that the sectoral self-government agreement with Mi’kmaq communities in Nova Scotia has had a positive impact on education services.¹² Indigenous communities are best positioned to know what their members need and how such social services should be provided.

Indigenous peoples also gain more autonomy because the signing of modern treaties frees them from the *Indian Act*.¹³ For example, Eva Clayton said that the coming into force of the Nisga’a treaty “marked the end of a 113-year journey.” In her words, “[o]n that day, the *Indian Act* ceased to apply to us, and for the first time the Nisga’a Nation had the recognized legal and constitutional authority to conduct its own affairs.”¹⁴

b. Economic development

It is not just Canada’s social and political development that Indigenous peoples have missed out on. They have missed out on the country’s economic development: they have “always been sitting on the back bench, sitting and watching this country develop as everybody gets rich.”¹⁵ According to Mr. Happynook, the Maa-nulth First Nations Final Agreement is slowly “pulling us out of 150 years of poverty.”¹⁶ Not only were Indigenous communities excluded from economic development, others profited from resources that were rightfully theirs.¹⁷ By settling land claims, Indigenous peoples are also seeking to take back their place in the economy.

Witnesses said that settling claims could contribute to Indigenous communities’ prosperity and that others would share in the benefits. According to Celeste Haldane, these treaties, when honourably implemented, “are a successful mechanism for the

10 INAN, [Evidence](#), 24 October 2017, 1230 (Natan Obed).

11 INAN, [Evidence](#), 19 October 2017, 1135 (Aluki Kotierk).

12 INAN, [Evidence](#), 28 September 2017, 0820 (Eleanor Bernard).

13 INAN, [Evidence](#), 25 September 2017, 0910 (Tom Happynook).

14 INAN, [Evidence](#), 25 September 2017, 1140 (Eva Clayton).

15 INAN, [Evidence](#), 28 September 2017, 0850 (Grand Chief Constant Awashish).

16 [Brief](#) presented by the British Columbia Treaty Commission, 25 September 2017.

17 INAN, [Evidence](#), 29 September 2017, 0800 (Chief Isadore Day).



protection and reconciliation of Indigenous rights and can generate significant economic benefits for Indigenous peoples as well as for the local, regional, provincial, and Canadian governments and their communities.”¹⁸ Other witnesses went even further, saying that for Canada to prosper Indigenous nations must also prosper.¹⁹ The Committee saw firsthand examples of the economic benefits that comprehensive land claims agreements can have for Indigenous communities. During its visit to British Columbia, the Committee heard that concluding a modern treaty had contributed to job creation and real estate development for the Tsawwassen First Nation.²⁰

C. Fundamental concerns regarding the claims processes

Despite the potential benefits of such agreements, specific claims and comprehensive land claim processes are not a panacea, and witnesses raised a number of concerns. Since these concerns are a barrier to reconciliation with Indigenous peoples, the Committee believes that they should be given special attention in policy renewal. Further, the focus should not be on success stories, which do not always give an accurate and full picture of all Indigenous experiences. It is also important to note that many Indigenous communities have yet to reach an agreement with Canada through this long and complex process.

a. Premise and principles of the processes

One concern is the terminology of claims policies and the premise and principles underlying the processes. Grand Chief Robert Pasco said it is wrong to say that Indigenous peoples are claiming their rights because they are not claiming anything: they are simply trying to “correct something that someone else made incorrectly.”²¹ Grand Chief Arlen Dumas stated:

The problems with specific claims and comprehensive claims policies are based on the assumption of crown sovereignty and title. Canadian laws and policies make the assumption of Canadian sovereignty over our territories. This requires First Nations to make claims to Canada versus the other way around. We dispute Canada's claim of sovereignty over our lands, outright. We assert that our sovereignty remains intact and that treaties are a recognition of Indigenous nationhood and sovereignty.²²

18 INAN, *Evidence*, 25 September 2017, 0905 (Celeste Haldane).

19 INAN, *Evidence*, 28 September 2017, 0810 (Grand Chief Constant Awashish).

20 Based on Committee analysts’ notes from the trip to Delta, British Columbia, 25 September 2017.

21 INAN, *Evidence*, 25 September 2017, 1130 (Grand Chief Robert Pasco).

22 INAN, *Evidence*, 27 September 2017, 0815 (Grand Chief Arlen Dumas).

The Committee heard overwhelmingly that the word “claims” is “patronizing,” “pejorative,” “incorrect” and “embedded [with] biases that I don’t think stand anymore.”²³ Others said that, in the claims process, the burden of proof should be reversed, since “First Nations shouldn't have to prove anything. The Government of Canada should prove that they're occupying a territory legally.”²⁴ In this respect, Grand Chief Awashish said Elders in his nation believe that the federal government should be the one making the effort to come to them to negotiate agreements about Indigenous lands.²⁵

Indigenous and Northern Affairs Canada (INAC) officials acknowledged that the nomenclature and premise of the processes was a problem and explained that they would now be taking an approach focussing on rights recognition.²⁶ This approach means that Canada is no longer starting from an assumption that no rights exist at the beginning of the processes.²⁷ However, departmental officials did not explain what practical implications this approach has for Indigenous groups currently negotiating with Canada or for those groups that are simply not taking part in negotiations because they do not see such negotiations as legitimate.

b. Imbalance between the parties and the bureaucratization of the processes

Witnesses explained that there is an imbalance in the processes because they use federal government laws, policies and enforcement mechanisms.²⁸ Moreover, the government can change the rules as it sees fit: “[t]hese policies are really at the whim of the government of the day. We see so much opportunity lost because governments bend, twist, and amend.”²⁹

Other witnesses said that “the years of colonialism and institutional oppression that the *Indian Act* has created has built a bureaucratic empire that has pretty much overpowered our people.”³⁰ According to Cheryl Casimer of the First Nations Summit,

23 INAN, [Evidence](#), 27 September 2017, 1030 (Jason Madden).

24 INAN, [Evidence](#), 24 October 2017, 1110 (Chief Jean-Guy Whiteduck).

25 INAN, [Evidence](#), 28 September 2017, 0850 (Grand Chief Constant Awashish).

26 INAN, [Evidence](#), 17 October 2017, 1210 (Joe Wild).

27 INAN, [Evidence](#), 17 October 2017, 1230 (Joe Wild).

28 INAN, [Evidence](#), 27 September 2017, 0815 (Grand Chief Arlen Dumas).

29 INAN, [Evidence](#), 29 September 2017, 0845 (Chief Isadore Day).

30 INAN, [Evidence](#), 29 September 2017, 0835 (Chief Isadore Day).



the “intrastate negotiations have become position-based, as government bureaucrats are assigned to oversee the process, and in many cases, negotiate treaties. This is not helpful or conducive to reconciliation.”³¹

The Assembly of First Nations (AFN) also said that INAC “has consistently treated Canada’s outstanding lawful obligations to First Nations as something that can be addressed through programs and services.”³² If the government is sincere about its commitment to reconciliation and a renewed relationship with Indigenous peoples, it needs to make sure that the claims processes are prioritized as a matter of justice.

D. Moving forward

Witnesses noted that several studies have been conducted on the claims process since the 1970s, yet the recommendations of Indigenous peoples have never been taken into account.³³ To work toward reconciliation, the government should review its policies on specific claims and comprehensive land claims by focusing on the benefits and removing the barriers identified by witnesses because “[r]econciliation means following the frameworks that we have, honouring them, and building upon them.”³⁴ The following chapters specifically address the concerns of Indigenous groups with respect to the specific claims, comprehensive land claims and self-government policies. The Committee hopes that its findings will help Canada and Indigenous peoples move forward together on a fair and good faith basis.

Witnesses pointed out that, while the relationship between the Crown and Indigenous peoples is evolutionary, claims settlement should not be seen as isolated in time: “[n]either reconciliation nor treaties should be viewed as a single event at a fixed point in time. Reconciliation should be viewed as an ongoing process, and treaties as a living expression of a relationship.”³⁵ To move forward, Canada will have to modernize its policies, but also reflect on the very nature of its relationship with Indigenous peoples.

Canada needs to recognize that, despite centuries of colonialism, Indigenous peoples “now look to the future instead of the past.”³⁶ Indigenous peoples are seeking to provide

31 INAN, [Evidence](#), 25 September 2017, 0915 (Cheryl Casimer).

32 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

33 [Brief](#) presented by the Algonquin Nation Secretariat, 26 October 2017; INAN, [Evidence](#), 25 September 2017, 1140 (Debbie Abbott).

34 INAN, [Evidence](#), 27 September 2017, 1110 (Wayne Wysocki).

35 INAN, [Evidence](#), 25 September 2017, 1345 (Charlie Cootes).

36 INAN, [Evidence](#), 28 September 2017, 1020 (Chief Martin Dufour).

a better future for their youth and future generations. They want to give their people “pride in being who they are, pride in practising their culture, pride in speaking their language, and the chance to participate in the economic development of this country.”³⁷ The Committee believes that Canada can do more to support Indigenous peoples as they move towards this future.

CHAPTER TWO: SPECIFIC CLAIMS

A. Introduction

a. Specific claims policy

Specific claims provide financial compensation to address injustices stemming from Canada’s “obligations under historic treaties or the way it managed First Nations’ funds or other assets.”³⁸ Examples of situations that could lead to a specific claim include: construction of a flood control dyke and road on a reserve without the First Nation’s consent or proper compensation and the federal government selling reserve lands without the consent of the First Nation.³⁹ Currently, there are 407 specific claims in progress across Canada, meaning that they are either under assessment or in negotiations, and 918 that have been concluded while 344 have been closed.⁴⁰

The initial process to settle specific claims and comprehensive land claims was developed following court decisions. For instance, in *Calder et al. v. Attorney General of British Columbia*,⁴¹ the Supreme Court of Canada confirmed the existence of Aboriginal title, as the historic occupation of land by Indigenous peoples gave rise to legal rights that survived European settlement.⁴² In response to this decision and others,⁴³ the federal government established the Office of Native Claims in 1974, which included a

37 INAN, [Evidence](#), 28 September 2017,0850 (Grand Chief Constant Awashish).

38 INAC, [Land Claims](#).

39 Office of the Auditor General of Canada, *Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada*, Exhibit 6.1, Fall 2016.

40 INAC, [Reporting Centre on Specific Claims](#).

41 [Calder et al. v. Attorney-General of British Columbia](#), [1973] SCR 313.

42 Emma Butt and Mary C. Hurley, [Specific Claims in Canada](#), Publication No 2006-18-E, Ottawa, Parliamentary Research and Information Service, Library of Parliament, 1 April 2006.

43 Documents prepared by INAC including [A History of Treaty-Making in Canada](#), suggest that other cases may have influenced the department’s decision to address comprehensive land claims including the 1972 Superior Court of Quebec Decision on the Cree of Northern Quebec and the 1973 *Paulette* decision in the Northwest Territories. The *Paulette* case was appealed to the Supreme Court of Canada who made a [decision](#) in 1976.



specific claims branch. In 1982, the federal government released *Outstanding Business: A Native Claims Policy*, which refined the existing policy and set out the process and guidelines for assessing and settling specific claims through negotiation. The policy was subsequently amended in the early 1990s.⁴⁴

In 2007, the *Justice at Last: Specific Claims Action Plan* (the Action Plan) was introduced. The Action Plan was intended to improve the existing specific claim process and to address the backlog of claims in the system, as well as to “ensure impartiality and fairness, greater transparency, faster processing and better access to mediation.”⁴⁵ The Action Plan included the following four pillars:

- creation of a legislated independent tribunal with the authority to issue binding decisions;
- dedicated funding for settlements in the amount of \$250 million per year for 10 years;
- faster processing of specific claims and improvements to internal government procedures; and
- better access to mediation services to help the parties reach negotiated settlements.⁴⁶

According to the specific claims policy, First Nations are responsible for conducting their own research and ensuring that the claim meets the minimum standard for submission to INAC. Pursuant to the *Specific Claims Tribunal Act*, the Minister has established a minimum standard for specific claim submissions. The standard requires claim submissions to include certain components and meet format requirements, such as the clear labelling of all supporting documents. Once submitted, INAC must assess the claim within a three-year time frame, and determine whether it will be accepted for negotiation. Once accepted, negotiations must be completed within an additional three-year time frame.⁴⁷

The enactment of the *Specific Claims Tribunal Act*, which came into force in 2008, provides First Nations with the opportunity to file claims with the Specific Claims

44 Ibid.

45 INAC, [*The Specific Claims Policy and Process Guide*](#).

46 Ibid.

47 INAC, [*The Specific Claims Policy and Process Guide*](#).

Tribunal in certain instances such as where a claim is not accepted for negotiation in whole or in part, or where a claim has not been settled through negotiation within a specific time frame (three years). The Tribunal has its own rules of practice and procedure⁴⁸ and is clothed with the authority to make binding decisions on specific claims and award monetary compensation to a maximum of \$150 million per claim. The Tribunal became operational on 1 June 2011.

b. Background

This chapter describes the many concerns raised by witnesses about the specific claims policy and process. The Mishkosim�iibiing (Big Grassy) First Nation explained that “a process intended to right past wrongs is itself re-victimizing those who were wronged by Canada’s past actions.”⁴⁹ To express his views about the specific claims process, Chief Martin Dufour of the Essipit Innu First Nation gave an example:

You give your house keys to a neighbour who then steals a number of things in your absence. A court simply asks the neighbour to return the stolen property, which he does. However, that court asks you to give the keys to the neighbour again, since he proved to be trustworthy by returning the stolen goods. Would you?⁵⁰

While the Committee heard that “[e]ach Nation is unique,”⁵¹ witnesses shared many similar concerns regarding each of the various stages of the specific claims process, from researching to funding to settling claims. Concerns raised regarding the Tribunal process will be addressed in the last part of this chapter.

B. Specific claims funding

Funding is critical to settling injustices.⁵² Adequate funding allows First Nations to research their claims and helps First Nations participate in negotiations.⁵³ However, the Committee heard that funding is an obstacle in the conclusion of specific claims. Insufficient and inadequate funds for First Nations impede claims settlement and the ability of First Nations to participate in the process.

48 [Specific Claims Tribunal Rules of Practice and Procedure](#), DORS/2011-119.

49 [Brief](#) presented by Mishkosim�iibiing (Big Grassy) First Nation, 19 October 2017.

50 INAN, [Evidence](#), 28 September 2017, 0950 (Chief Martin Dufour).

51 [Brief](#) presented by the Nlaka’pamux Nation Tribal Council, October 2017.

52 INAN, [Evidence](#), 29 September 2017, 0855 (Luke Hunter).

53 [Brief](#) presented by the Nlaka’pamux Nation Tribal Council, October 2017.



a. Research funding

Research funding is essential in “providing access to justice.”⁵⁴ Several witnesses emphasized the importance of having adequate resources to carry out research on specific claims. Patricia Myran, Assistant Director at the Treaty and Aboriginal Rights Research Centre of Manitoba (TARR), said it takes anywhere from six months to two years to develop a claim, and each researcher can handle only one or two claims a year.⁵⁵

The Committee was told, however, that several research organizations have experienced drastic funding cuts, and this was also reported by the Auditor General in 2016.⁵⁶ Morgan Chapman, a research associate at Havlik Metcs Ltd., reported that between 2010 and 2015, research funding decreased by up to 57%.

The Committee heard that these research cuts have weakened the capacity of research organizations, which often find themselves having to lay off staff, including researchers. With limited financial and human resources, some organizations are unable to cope with their current workload.⁵⁷ Due to these cuts, organizations do not have sufficient funds to administer their affairs or conduct legal and research work to prepare the documentation required to meet the minimum standard for filing specific claims. This leads to delays in researching and developing specific claims.⁵⁸ The Anishinabek Nation said that “some organizations were so debilitated that they have been unable to submit any claims at all.”⁵⁹

b. Funding to participate in the process

The lack of funding is felt not only at the research stage but also during negotiations and at the Specific Claims Tribunal. Luke Hunter of the Nishnawbe Aski Nation said that funding levels are insufficient and do not take into account the actual costs of participating in negotiations in terms of legal advice, experts and community meetings.⁶⁰

54 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

55 INAN, [Evidence](#), 26 October 2017, 1305 (Patricia Myran).

56 Office of the Auditor General of Canada, [Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada](#).

57 INAN, [Evidence](#), 26 October 2017, 1305 (Patricia Myran).

58 [Brief](#) presented by the Anishinabek Nation, 24 October 2017; INAN, [Evidence](#), 29 September 2017, 0820 (Luke Hunter).

59 [Brief](#) presented by the Anishinabek Nation, 24 October 2017.

60 INAN, [Evidence](#), 29 September 2017, 0820 (Luke Hunter).

The Algonquin Nation Secretariat (ANS) explained how insufficient funding affects First Nations in accessing the Tribunal:

As it is today, Canada has crafted policies related to funding which effectively discourage First Nations from accessing the Specific Claims Tribunal. This denies claimants access to justice.⁶¹

ANS pointed out that insufficient funding is also a problem in terms of applications for judicial review of tribunal decisions, as the federal government, which often seeks a review, refuses to provide funding to First Nations to help them defend their case. ANS recommended that funding be provided to First Nations whose claims were rejected for negotiation in order to cover the actual costs incurred for tribunal proceedings.⁶² Further, ANS recommended that funding be provided to First Nations to support their case where the federal government applies for judicial review.

c. Funding methods

The Committee was told about issues with current funding methods, such as contribution agreements, funding instability and how funding is provided. TARR reported that its annual contribution agreements with the federal government are challenging because they do not allow enough time for review and discussion of the proposed agreements.⁶³ TARR also stated that unstable funding undermines the organization's work and limits its ability to carry out research work effectively. TARR Director Cam Stewart emphasized the consequences of unstable funding:

The fact that we're going year to year means we have no traction. That means we can hire staff, but we're not sure if they're going to be around the next year, very simply, and that affects everything.... If we have a claim on our books, and we cannot pursue it the next year because our funding agreement is not adequate, that means their community is suffering because that claim is shelved.⁶⁴

The Committee was told about the importance of having consistent funding for specific claims to carry out research and ensure communities participate fully in negotiations.⁶⁵ Witnesses suggested developing a stable, multi-year funding framework with adequate

61 [Brief](#) presented by the Algonquin Nation Secretariat, 26 October 2017.

62 Ibid.

63 [Brief](#) presented by the Treaty and Aboriginal Rights Research Centre of Manitoba.

64 INAN, [Evidence](#), 26 October 2017, 1300 (Cam Stewart).

65 INAN, [Evidence](#), 25 September 2017, 1140 (Debbie Abbott).



financial resources so organizations can meet their research needs,⁶⁶ including multi-year contribution agreements.⁶⁷

Witnesses also raised concerns about loan funding for the specific claims process, which affects their ability to participate at the various stages of the process and settle their claims. The Committee heard that loan funding prevents them from negotiating on an even playing field with the federal government, especially when the process drags on for years.⁶⁸ For the Mishkosiminiziibiing First Nation, who has spent approximately nine years in negotiations, the accumulation of debt had a “severe effect” on their “borrowing power for infrastructure and housing,” and also impacted service delivery in the community.⁶⁹ Moreover, the “loan funding structure may even incentivize the First Nation to settle for a lowball offer just to get out from under the loan funding debt.”⁷⁰ Mr. Hunter recommended that some of the funding should be on a grant basis and determined jointly by the federal government and the affected First Nations.⁷¹ Another witness said that making advance payments when Canada agrees to negotiate a claim would “demonstrate “good faith on the part of Canada, and it may provide momentum to the negotiations.”⁷²

Moreover, when the Committee visited the Tsawwassen First Nation, which is involved in a specific claim with 17 other First Nations, representatives raised issues about the current process for assigning negotiation loans as the federal government will only negotiate if all the communities involved are at the negotiating table. The Tsawwassen First Nation said that negotiations on the claim have stalled because the current funding mechanism does not provide loans to all communities with interests in the same claim.⁷³

66 INAN, [Evidence](#), 26 October 2017, 1210 (Cam Stewart); [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

67 INAN, [Evidence](#), 26 October 2017, 1305 (Cam Stewart).

68 [Brief](#) presented by Mishkosiminiziibiing (Big Grassy) First Nation, 19 October 2017.

69 INAN, [Evidence](#), 26 October 2017, 1240 (Glenn Archie).

70 Ibid.

71 INAN, [Evidence](#), 29 September 2017, 0820 (Luke Hunter).

72 INAN, [Evidence](#), 26 October 2017, 1245 (Glenn Archie).

73 Based on Committee analysts’ notes from the trip to Delta, British Columbia, 25 September 2017.

C. Assessment of specific claims

Witnesses noted that the criteria for evaluating claims and the federal government's approach in the early stages of the process impede First Nations' access to the process as well as the settlement of specific claims.

With respect to the evaluation criteria, the Committee was told about the narrow scope of the claims that are eligible under the specific claims policy and that exclusions in the federal policy are a long-standing problem. Mr. Hunter said that the exclusion of claims pertaining to education programs and "treaty rights related to activities of an ongoing variable nature, such as harvesting rights,"⁷⁴ is "arbitrary and unfair."⁷⁵ He recommended broadening the scope of the federal policy to include claims based on relationship and equity issues, arguing that an "equity-based approach is consistent with the honour of the crown and the overarching objective of moving forward with reconciliation."⁷⁶

Witnesses also raised a number of concerns relating to the federal government's approach in the initial stages of the process, namely the criteria related to the minimum standard prior to evaluation, the claims evaluation process, calculating the value of the claim, and the practice of partial acceptance. As Chief Jim Bear of the Brokenhead Ojibway Nation said, the file is "reviewed by those who I think have an obligation, but it doesn't reflect a fair process in terms of the first nation, because it's taken entirely out of our hands."⁷⁷

a. Minimum standard

The Committee heard that the current minimum standard affects the preparation of specific claims for First Nations. Witnesses said that the minimum standard increases the workload of research organizations, which are already faced with a decrease in funding, and delays in the filing of claims. Ms. Chapman pointed out that the minimum standard often applies superficial criteria that "do not impact the validity of the claim brought forward by the nation."⁷⁸ To address this problem, the Anishinabek Nation recommended ending the practice of imposing the minimum standard "unreasonably."⁷⁹

74 Indigenous and Northern Affairs Canada, [The Specific Claims Policy and Process Guide](#).

75 INAN, [Evidence](#), 29 September 2017, 0820 (Luke Hunter).

76 Ibid.

77 INAN, [Evidence](#), 27 September 2017, 1010 (Chief Jim Bear).

78 INAN, [Evidence](#), 25 September 2017, 1330 (Morgan Chapman).

79 [Brief](#) presented by the Anishinabek Nation, 24 October 2017.



b. Independence of the process

Many witnesses raised concerns regarding the independence of the specific claims process. The AFN indicated that First Nations have been critical of the specific claims process for some time “noting [that] it lacked impartiality and objecting to the fact that Canada controlled the claims process.”⁸⁰ Although the Specific Claims Tribunal was created as an independent body, the Committee heard that First Nations continue to experience a “conflict of interest” in the process since “Canada is judge, jury and banker on claims against itself.”⁸¹ Witnesses identified specific examples where they perceived there to be a conflict of interest including in the assessment of claims and mediation. In terms of the assessment of claims, Jody Woods noted that: “A claim is submitted, and Canada then assesses its validity. That validity is right now determining such things as access to negotiation dollars and access to full and fair negotiations.”⁸² Several witnesses pointed out that this practice is detrimental to First Nations and creates an imbalance that is at odds with reconciliation.⁸³ Further, regarding mediation, the AFN explained that Canada has “further entrenched its conflict of interest” since INAC administers mediation services.⁸⁴ For this reason, mediation processes were not viewed as independent, leading few First Nations to utilize these services.⁸⁵

In order to eliminate these concerns, witnesses recommended that the federal government withdraw from the evaluation process and that an independent body be established to ensure a truly impartial process.⁸⁶ In addition to recommending the creation of an independent process, the British Columbia Specific Claims Working Group recommended that it “be done in full partnership with Indigenous Nations.”⁸⁷ AFN recommended that federal funding be provided to support the development of an independent body so that it is capable of “managing and funding all aspects of the process, including research, submissions, negotiations, and mediation.”⁸⁸

80 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

81 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

82 INAN, [Evidence](#), 25 September 2017, 0940 (Jody Woods).

83 INAN, [Evidence](#), 27 September 2017, 0815 (Grand Chief Arlen Dumas); INAN, [Evidence](#), 26 October 2017, 1110 (Chief Wayne McKenzie); [Brief](#) presented by the Algonquin Nation Secretariat, 26 October 2017.

84 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

85 [Brief](#) presented by the Assembly of First Nations, 27 October 2017; INAN, [Evidence](#), 17 October 2017, 1110, (Michael Ferguson).

86 INAN, [Evidence](#), 26 October 2017, 1215 (Cam Stewart).

87 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

88 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

c. Transparency of the assessment process

Along with the concerns raised about the independence of the evaluation process, witnesses also raised concerns about the level of transparency in the evaluation of specific claims. Ms. Chapman noted that her firm used to have discussions and follow-ups with departmental employees to explain why a claim was denied. However, these discussions have not taken place for the past decade or so.⁸⁹ Witnesses said that claims eligibility standards are not well communicated, resulting in communities not always understanding the criteria applied in the evaluation of their claims.⁹⁰ Chief Stacey Laforme of the Mississaugas of the New Credit First Nation explained her community's frustration:

Basically, there's no dialogue during Canada's assessment stage. ... We don't hear anymore about it until, "Hello, here's our decision." That's problematic, and it creates an adversarial relationship as opposed to a relationship where we could work together.⁹¹

In this regard, Debbie Abbott recommended that the federal government communicate with First Nations directly in order to share ideas on how to move specific claims forward.⁹² The Anishinabek Nation recommended that the federal government meet with individual claimants to "review, assess and advise on the development of claims prior to submission."⁹³

d. Calculating the value of claims

When reviewing a specific claim, the federal government evaluates the value of claims for compensation. Witnesses noted that the federal government's approach to calculating the value of claims has a direct impact on the negotiation and settlement of claims.

One concern relates to the "80-20" rule. This formula calculates the value of specific claims based on 80% simple interest and 20% compound interest. Chief Jean-Guy Whiteduck of the Kitigan Zibi Anishinabeg First Nation said that these rates do not favour First Nations.⁹⁴ Chief R. Donald Maracle of the Mohawks of the Bay of Quinte pointed

89 INAN, *Evidence*, 25 September 2017, 1330 (Morgan Chapman).

90 INAN, *Evidence*, 29 September 2017, 1035 (Philippe White-Cree).

91 INAN, *Evidence*, 29 September 2017, 1045 (Chief Stacey Laforme).

92 INAN, *Evidence*, 25 September 2017, 1140 (Debbie Abbott).

93 *Brief* presented by the Anishinabek Nation, 24 October 2017.

94 INAN, *Evidence*, 24 October 2017, 1105 (Chief Jean-Guy Whiteduck).



out that, although the Specific Claims Tribunal rejected this calculation method last year,⁹⁵ it is important for the federal government to tell First Nations what calculation method is being used so that they know what to expect in negotiations.⁹⁶

In addition to the formula for calculating the value of claims, witnesses also raised concerns on how the assigned value of claims affects negotiations. The Committee heard that specific claims valued at under \$3 million have significant disadvantages, including the inability to negotiate and the presentation of take-it-or-leave-it offers. The Nlaka’pamux Nation Tribal Council said that these offers “did nothing to increase resolution” and that this approach undermines the credibility of the specific claims process.⁹⁷

On the other hand, some claims are valued at more than \$150 million. The specific claims policy states that the Minister must first obtain a discrete mandate before accepting these claims for negotiation.⁹⁸ Witnesses raised concerns about this government-set limit, noting that the \$150 million cap “is too low” and forces many First Nations to enter the judicial process.⁹⁹ Witnesses also raised concerns about large value claims remaining dormant while their lands continue to be developed by third parties.¹⁰⁰ The Anishinabek Nation recommended that a process to settle claims over \$150 million be established in collaboration with First Nations.¹⁰¹

e. Partial acceptances

The Committee heard that the federal government sometimes accepts only parts of a claim for negotiation. Witnesses said that in those cases, they can negotiate their claim, provided that the First Nation agrees to give up the right to pursue other aspects of their claim. As one witness put it, “Canada agrees to negotiate as long as the First Nation agrees not to.”¹⁰² Witnesses pointed out that partial acceptances can lead to problems: they lower the value of the claims to the extent that they often become small value

95 [Huu-Ay-Aht First Nations v. Her Majesty the Queen in Right of Canada](#), 2016 SCTC 14.

96 INAN, [Evidence](#), 29 September 2017, 1000 (Chief R. Donald Maracle).

97 [Brief](#) presented by the Nlaka’pamux Nation Tribal Council, October 2017.

98 INAC, [The Specific Claims Policy and Process Guide](#).

99 INAN, [Evidence](#), 29 September 2017, 0935 (Ryan Lake).

100 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

101 [Brief](#) presented by the Anishinabek Nation, 24 October 2017.

102 INAN, [Evidence](#), 25 September 2017, 1335 (Morgan Chapman).

claims (under \$3 million), which cannot be negotiated.¹⁰³ Further, they cause First Nations to take back the elements of their original claim that were denied and resubmit them as separate claims, which increases their workload and adds to the number of unsettled specific claims.¹⁰⁴ Witnesses recommended an end to partial acceptances.

D. Specific claims negotiation

In order to begin negotiations, the Minister must first accept a specific claim for negotiation and the First Nation must agree to participate. If the Minister says that a specific claim will be negotiated, and the First Nation says that it is willing to enter into the negotiations as specified in the Minister's Notice of Acceptance, negotiations will follow. However, witnesses expressed concerns about the current negotiation framework and the federal government's approach to the negotiation process, as well as access to mediation services. In this respect, Chief Martin Dufour of the Essipit Innu First Nation said:

The main change we want is a change in attitude. Instead of addressing specific claims in an adversarial context where Canada first seeks to limit its responsibility, we want to see an approach consistent with the unique and ongoing relationship between our nations.¹⁰⁵

a. Approach and negotiation framework

Witnesses recounted their experience in the specific claims negotiation process, saying that the federal government's approach and the current negotiating framework prevent claims from being settled.¹⁰⁶ Witnesses said that negotiations are conducted on federal terms.¹⁰⁷ Chief Bear said that the environment during negotiations was "very adversarial"¹⁰⁸ and that "very little is in the way of the First Nation."¹⁰⁹ Another witness said that the strict process does not allow representatives to inform their members about the status of negotiations, which "causes problems with building relations internally, as well as externally."¹¹⁰

103 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

104 INAN, [Evidence](#), 25 September 2017, 1335 (Morgan Chapman); [Brief](#) presented by the Anishinabek Nation, 24 October 2017; [Brief](#) presented by the Nlaka'pamux Nation Tribal Council, October 2017.

105 INAN, [Evidence](#), 28 September 2017, 1005 (Chief Martin Dufour).

106 INAN, [Evidence](#), 29 September 2017, 1050 (Chief Stacey Laforme).

107 INAN, [Evidence](#), 27 September 2017, 0830 (Grand Chief Nelson Genaille).

108 INAN, [Evidence](#), 27 September 2017, 0920 (Chief Jim Bear).

109 INAN, [Evidence](#), 27 September 2017, 1010 (Chief Jim Bear).

110 INAN, [Evidence](#), 29 September 2017, 1050 (Chief Stacey Laforme).



Chief Maracle noted that, while there are still constraints, he is “seeing some creative activity in the thinking at the table.”¹¹¹ To achieve this, however, witnesses emphasized the importance of greater engagement by the federal government in its approach and a change in the current process to promote an ongoing relationship between nations.¹¹²

Another witness raised the problem that negotiations take place in cities, not communities.¹¹³ It was suggested that government officials visit the communities to speak directly to the members,¹¹⁴ as “[r]esolving these grievances requires engagement on the ground.”¹¹⁵

b. Mediation

Although in its Action Plan INAC committed to increasing the use of mediation to help reach negotiated settlements, the Committee was told that these services were not used.¹¹⁶ Michael Ferguson, the Auditor General of Canada, said in his appearance before the Committee that the very limited recourse to mediation was a barrier to the claims process and the settlement of claims. Mr. Ferguson said that “the department had set up that mediation service within the department itself, so the First Nations didn't see it as truly independent. Therefore, it was used only once in the process that we saw.”¹¹⁷ Ms. Chapman said that the limited access to mediation services for claims rejected for negotiation is because the federal government refuses to participate on the grounds that it had already refused to negotiate.¹¹⁸ In particular, the AFN recommended that mediation be included in the mandate of an independent body responsible for managing and funding all aspects of the specific claims process.¹¹⁹

111 INAN, [Evidence](#), 29 September 2017, 0920 (Chief R. Donald Maracle).

112 INAN, [Evidence](#), 28 September 2017, 1005, (Chief Martin Dufour).

113 INAN, [Evidence](#), 29 September 2017, 1050 (Chief Stacey Laforme).

114 INAN, [Evidence](#), 26 October 2017, 1220 (Patricia Myran).

115 INAN, [Evidence](#), 25 September 2017, 1140 (Debbie Abbott).

116 Office of the Auditor General of Canada, [Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada](#).

117 INAN, [Evidence](#), 17 October 2017, 1110, (Michael Ferguson).

118 INAN, [Evidence](#), 25 September 2017, 1340 (Morgan Chapman).

119 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

E. Specific claims settlement

The specific claims policy provides that compensation to First Nations for losses and damage is determined by set criteria. Where it is established that certain lands were never lawfully surrendered or taken, the policy provides that bands be compensated either “by the return of the lands or by the current unimproved value of the lands.”¹²⁰

As Chief Isadore Day said, the return of land is the ultimate goal and a priority for the First Nations.¹²¹ Several witnesses argued, however, that the current compensation scheme is neither comprehensive nor adequate as the practice of returning land is virtually non-existent and compensation for harms is limited to monetary compensation. According to Chief Maracle, the federal government’s position does not take into account the possibility of returning land as provided for in the federal policy. However, he said that this is due to a lack of clear direction and recommended that the Minister provide clarity by informing departmental staff of the scope of this form of compensation as provided for in the federal policy.¹²²

In the same vein, the Essipit Innu First Nation said it is important for the reparation mechanism to go beyond pecuniary damages.¹²³ Mr. Chaloult said that:

The reparation is not comprehensive, and there's the rub. The narrow scope of the specific claims policy and the *Specific Claims Tribunal Act* does not provide for any form of compensation other than money. There is no provision for a rehabilitating remedy, no apologies, no regrets or even doubts, let alone a guarantee that such mistakes will not happen again. There is nothing to heal the wounds and to rectify the injustice.¹²⁴

To this end, the Essipit Innu First Nation recommended providing alternative, complementary forms of compensation to “support a form of acknowledgement of past wrongs”¹²⁵ such as public apologies. It suggested that these forms of compensation be non-pecuniary and based on the following principles: compensation, restitution, rehabilitation, satisfaction and prevention. The Essipit Innu First Nation also said that if financial compensation is the only

120 INAC, *The Specific Claims Policy and Process Guide*.

121 INAN, *Evidence*, 29 September 2017, 0805 (Chief Isadore Day).

122 INAN, *Evidence*, 29 September 2017, 1015 (Chief R. Donald Maracle).

123 *Brief* presented by the Essipit Innu First Nation.

124 INAN, *Evidence*, 28 September 2017, 1000 (Marc Chaloult).

125 *Ibid.*



possible avenue, the amount should take into account the injury and the nature of the breach and not be based solely on expropriation-related compensation.¹²⁶

Witnesses also told the Committee about barriers in the implementation of treaty land entitlement (TLE) agreements.¹²⁷ TLEs are a category of specific claims asserting that the Crown did not provide the land promised under treaties. Following a negotiation process and a settlement agreement, a First Nation may purchase land on a willing-buyer/willing-seller basis or select from unoccupied federal or provincial/territorial land. The First Nation can then add these lands to their reserve under the federal Additions to Reserve Policy. It is important to note the process for adding lands to reserve is distinct from the specific claims, and occurs after a specific claims agreement has been reached.¹²⁸

The Committee heard that the additions to reserve process poses significant challenges for First Nations: Grand Chief Sheila North Wilson of Manitoba Keewatinowi Okimakanak Inc. described the process as “long and arduous,” and expressed concerns that the current process will not “meaningfully increas[e] the total reserve lands of First Nations in Manitoba or across the country.”¹²⁹ Chief Bear listed a number problems with the process, for example insufficient land allocation, obstacles to land selection and acquisition, third party interests, municipal relations, loss of use and opportunities, and the lengthy and complex additions to reserve process.¹³⁰ Chief Bear added:

We also live in an era in which we are forced to create satellite reserves and jump through the endless reserve-creation hoops that continue to delay our use and the benefit of our land.¹³¹

Regarding the length of the additions to reserve process, the Committee was told during its visit to Winnipeg that fewer than half of the lands that First Nations can select or acquire under the Manitoba Treaty Land Entitlement Framework Agreement had been selected for addition to reserves,¹³² and that it takes an average of eight years to complete the process. Loretta Ross, Treaty Commissioner, Treaty Relations Commission

126 Ibid.

127 The vast majority of TLEs (90%) originate in Manitoba and Saskatchewan. In these provinces, framework agreements have been developed between the province and Canada for the provision of land to satisfy a TLE claim and convert land to reserve status: Indigenous and Northern Affairs Canada, [Treaty Land Entitlements](#).

128 Ibid.

129 INAN, [Evidence](#), 27 September 2017, 0805 (Grand Chief Sheila North Wilson).

130 INAN, [Evidence](#), 27 September 2017, 0915; 0920 (Chief Jim Bear).

131 INAN, [Evidence](#), 27 September 2017, 0915 (Chief Jim Bear).

132 Based on Committee analysts’ notes from the trip to Winnipeg, Manitoba, 27 September 2017.

of Manitoba, also pointed out that the lengthy process was impeding economic development because of missed economic opportunities.¹³³

The Salt River First Nation, which signed a TLE settlement agreement and received reserve land in 2008, told the Committee about the hardship of not having a land base for years while waiting for their agreement to be signed. Lacking a land base, Salt River First Nation's current community members were unable to gather together and suffered a "grave cultural and language loss."¹³⁴ Moreover, the Salt River First Nation raised concerns about the implementation of the settlement agreement, pointing out that the federal government has failed to set aside all of the lands selected under the agreement as reserve lands.¹³⁵

Chief Maracle described the additions to reserve policy as problematic because it is "unreasonable to expect our community to buy its own treaty lands back" and because it is government officials who decide whether land can be added, arguing that the policy "deals with Indian land as a mere policy issue, rather than recognizing the constitutionally protected Aboriginal and treaty rights of Aboriginal peoples."¹³⁶ Some witnesses including Ryan Lake conveyed that overlapping jurisdictional challenges between the federal government and provincial and territorial governments can be a source of challenge when it comes to the resolution of claims.¹³⁷

F. Specific Claims Tribunal

The Committee was told that, in general, the Specific Claims Tribunal is working and is "achieving the objectives that it sought to effect."¹³⁸ Concerns remain though: witnesses said that the tribunal's proceedings are "equally long and difficult"¹³⁹ and that some First Nations do not want to turn to the tribunal because its rules of procedure and decision-making process do not take account of First Nations' laws and processes.¹⁴⁰

133 Ibid.

134 Brief presented by the Salt River First Nation, 26 October 2017.

135 Ibid.

136 INAN, *Evidence* 29 September 2017, 0925 (Chief R. Donald Maracle).

137 INAN, *Evidence*, 29 September 2017, 0930 (Ryan Lake).

138 INAN, *Evidence*, 29 September 2017, 0935 (Ryan Lake).

139 INAN, *Evidence*, 28 September 2017, 0950 (Chief Martin Dufour).

140 INAN, *Evidence*, 27 September 2017, 0815 (Grand Chief Arlen Dumas); INAN, *Evidence*, 29 September 2017, 0850 (Luke Hunter).



With respect to the parties' relationship during tribunal proceedings, witnesses said the federal government has a "confrontational and adversarial attitude,"¹⁴¹ for example by working hard to turn over every piece of evidence presented by First Nations.¹⁴² The Essipit Innu First Nation noted that the federal government takes a hardline stance and that, "[i]nstead of simplifying and streamlining the proceedings, Canada increases the burden by systematically denying every point that might hurt its case,¹⁴³ an attitude that to some witnesses violates the flexibility advocated by the Supreme Court of Canada with regard to Indigenous issues.¹⁴⁴ On this point, Glenn Archie said that this is a major hurdle for First Nations who may have little time to produce the required evidence, which can be difficult when it involves gathering evidence from Elders.¹⁴⁵

Witnesses also noted that the tribunal could play a greater role in the evaluation and determination of specific claims. Ms. Chapman believes that First Nations should be able to file their specific claim with the tribunal without having to wait three years and without the Minister's consent.¹⁴⁶ As to the role of the tribunal, Justice Harry Slade, Chair of the tribunal, was critical of government programs designed to address specific claims, saying that the "honour of the Crown" precept and the fiduciary relationship between the Crown and Indigenous peoples are "matters for justice."¹⁴⁷

In addition to the role of the tribunal in the specific claims process, witnesses said that the tribunal should have more authority in the granting of compensation. Ms. Chapman recommended that the tribunal have the authority to "reduce or eliminate outstanding negotiation loans incurred as a result of the federal foot-dragging, policy flip-flops, or bad-faith negotiations."¹⁴⁸ The Essipit Innu First Nation said that the tribunal's remedial powers should include forms of compensation that take account of the flexibility of restorative justice.¹⁴⁹ With regard to monetary compensation, Mr. Lake said that the

141 [Brief](#) presented by the Essipit Innu First Nation.

142 INAN, [Evidence](#), 26 October 2017, 1305 (Glenn Archie).

143 [Brief](#) presented by the Essipit Innu First Nation.

144 Ibid.

145 INAN, [Evidence](#), 26 October 2017, 1310 (Glenn Archie).

146 INAN, [Evidence](#), 25 September 2017, 1340 (Morgan Chapman).

147 INAN, [Evidence](#), 19 October 2017, 1215 (Justice Harry Slade).

148 INAN, [Evidence](#), 25 September 2017, 1340 (Maorgan Chapman).

149 [Brief](#) presented by the Essipit Innu First Nation, 27 September 2017.

\$150 million limit the tribunal can award is not enough to address the damages suffered by First Nations.¹⁵⁰

Witnesses again raised concerns about access to mediation services to settle specific claims at the tribunal.¹⁵¹ Justice Slade said that there is “an express recognition of the value of mediation, and the tribunal is empowered to make rules with respect to mediation.”¹⁵² He noted that more than 90% of civil filings are settled through alternative dispute resolution, such as mediation, and that without these services courts “would get completely bogged down.”¹⁵³ However, Justice Slade said that the government has little interest in negotiating or participating in the mediation process for claims that have been rejected by the Minister, noting that “this treats all claims before the Tribunal as presumptively “invalid.” This seems contrary to the goal of negotiation.”¹⁵⁴ Ms. Chapman suggested expanding the tribunal’s authority with respect to mediation, noting that the federal government has been reluctant in the past to agree to participate in the mediation process.¹⁵⁵

With respect to the length of tribunal proceedings, Justice Slade identified issues that impede the settlement of specific claims and that protract proceedings. In particular, he stated that there is a lack of transparency in the federal government’s practices at the claims assessment stage. He argued that this lack of transparency has an impact on the tribunal, since the federal government, by objecting to the introduction of claims assessment reports based on negotiation privilege, protracts proceedings and increases costs, due to the need to start anew with the disclosure of evidence. In this regard, Justice Slade recommended that the tribunal have access to the full record of the Specific Claims Branch. According to Justice Slade, access to this information could allow the tribunal to conduct an early assessment of the merits of a claim, with the consent of the parties, thereby speeding up proceedings.¹⁵⁶

150 INAN, [Evidence](#), 29 September 2017, 0920 (Ryan Lake).

151 INAN, [Evidence](#), 29 September 2017, 0940 (Ryan Lake).

152 INAN, [Evidence](#), 19 October 2017, 1210 (Justice Harry Slade).

153 INAN, [Evidence](#), 19 October 2017, 1215 (Justice Harry Slade).

154 [Brief](#) presented by the Specific Claims Tribunal Canada, 19 October 2017.

155 INAN, [Evidence](#), 25 September 2017, 1340 (Morgan Chapman).

156 [Brief](#) presented by the Specific Claims Tribunal Canada, 19 October 2017.



CHAPTER THREE: COMPREHENSIVE LAND CLAIMS

A. Introduction

a. Comprehensive land claims policy

Comprehensive land claims “arise in areas of Canada where Aboriginal land rights have not been dealt with by past treaties or through other legal means.”¹⁵⁷ Following the Supreme Court of Canada’s decision in *Calder*, which confirmed that Indigenous peoples’ historic occupation of the land gave rise to legal rights that predated European settlement, the federal government released its first comprehensive land claims policy in 1973. Titled *Statement on Claims of Indian and Inuit People*, the primary purpose of this policy was to provide certainty to the government regarding land ownership and management, which was obtained by “[exchanging] undefined Aboriginal rights for a clearly defined package of rights and benefits”¹⁵⁸ as set out in the negotiated agreement. In 1986, the federal government made substantive changes to the policy, which broadened the scope of negotiable matters and provided more options to address Indigenous rights without requiring a blanket extinguishment of rights in exchange for a settled agreement.

Canada’s approach to negotiating comprehensive land claims agreements has changed since the policy was last updated in 1986. As such, Indigenous groups as well as provincial and territorial governments have long called on the federal government to renew its policy to address Aboriginal and treaty rights. In July 2014, the federal government announced new measures to help advance treaty negotiations, including an interim policy on comprehensive land claims agreements. According to INAC, the interim policy is a starting point for discussions between Canada and its Indigenous partners on the renewal of the comprehensive land claims policy.¹⁵⁹

Agreements resulting from the negotiation of these claims (also known as modern treaties) address matters such as ownership of lands and resources, harvesting and wildlife, self-government, economic development, and capital transfers. Indigenous groups and governments ratify these agreements, which are generally subject to legislation giving them effect. These agreements are protected by the *Constitution Act, 1982*, specifically section 35, which recognizes and affirms “the existing aboriginal and

157 INAC, *Comprehensive Claims*.

158 Mary C. Hurley, *Settling Comprehensive Land Claims*, Publication No 2009-16-E, Ottawa, Parliamentary Research and Information Service, Library of Parliament, 21 September 2009.

159 INAC, *Renewing the Comprehensive Land Claims Policy*, September 2014.

treaty rights of the aboriginal peoples of Canada.”¹⁶⁰ In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada stated that “Section 35 represents a promise of rights recognition” and that “[t]his promise is realized and sovereignty claims reconciled through the process of honourable negotiation.”¹⁶¹ In the context of comprehensive land claims, section 35 is particularly important because as noted by the Supreme Court, the Crown has “not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims.”¹⁶²

b. Background

Since 1973, Canada has signed 26 comprehensive land claims agreements with different Indigenous groups (a map illustrating these agreements is appended to the report). Of these, 18 contain self-government provisions. Canada is currently negotiating 46 comprehensive land claims, the majority in British Columbia.¹⁶³ According to Douglas Eyford, who in 2014 led a discussion with Aboriginal groups and key stakeholders about the renewal of Canada’s comprehensive land claims policy, this figure is likely to rise under the current policy.¹⁶⁴

Many witnesses pointed out to the Committee that comprehensive land claims agreements are unique in their content and constitutional character.¹⁶⁵ According to Aluki Kotierk, the President of Nunavut Tunngavik Inc., “each treaty has its own character, and each Indigenous party speaks for its own treaty.”¹⁶⁶ Witnesses explained that Canada needs to stop treating all Indigenous communities in the same way with respect to comprehensive land claims.¹⁶⁷ A one-size-fits-all policy cannot be put in place due to the diversity between First Nations, Inuit and Métis communities¹⁶⁸ as a uniform

160 Government of Canada, *Constitution Acts, 1867 to 1982*.

161 *Haida Nation v. British Columbia (Minister of Forest)*, [2004] 3 SCR 511.

162 *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257 referring to the decision in *Haida Nation v. British Columbia (Minister of Forests)*.

163 INAN, *Evidence*, 19 September 2017, 1200 (Perry Billingsley).

164 INAN, *Evidence*, 26 October 2017, 1220 (Douglas Eyford).

165 INAN, *Evidence*, 25 September 2017, 1145 (Eva Clayton).

166 INAN, *Evidence*, 19 October 2017, 1110 (Aluki Kotierk).

167 INAN, *Evidence*, 23 October 2017, 0850 (Christopher Devlin).

168 INAN, *Evidence*, 26 October 2017, 1130 (Chief Harry St. Denis).



policy may not fully capture how negotiations on comprehensive land claims are affected by socio-economic and geographic context.¹⁶⁹

The Committee understands these concerns and has made efforts to meet with representatives of First Nations, Inuit and Métis communities representing different types of claims and in different phases of negotiation across the country. Although Canada should take a holistic, whole-of-government approach to settling comprehensive land claims, witnesses suggested the approach should be flexible enough to take into account the specific characteristics of each community. The Committee hopes that this report will contribute to the renewal of the comprehensive land claims policy by summarizing the issues raised by the witnesses. Reconciliation requires real commitments in a number of areas, including the negotiation and implementation of modern treaties. To advance reconciliation with Indigenous peoples, Canada must demonstrate greater flexibility in its approaches to negotiations.

B. Concerns regarding comprehensive land claims

As the British Columbia Treaty Association stated, a “modern treaty, fairly negotiated and honourably implemented, is the greatest expression of reconciliation.”¹⁷⁰ Indigenous peoples’ concerns about the process must be taken into account as these concerns can undermine their confidence in government’s good faith to reach an agreement. This section will raise some of the concerns noted by witnesses related to negotiation length, which is directly and indirectly affected by federal negotiators’ mandates, overlapping land claims between Indigenous groups, and Canada’s goal of obtaining as much certainty as possible when signing modern treaties. The Committee heard from several witnesses who spoke about their experience with the negotiation process, which they described as “complex, expensive, and politically difficult.”¹⁷¹ Several witnesses also said that a lack of flexibility during the negotiations was a serious obstacle to positive outcomes.

a. Length of negotiations

According to an INAC official, reaching a final agreement on a comprehensive land claim takes approximately 18 years of negotiations, with two years of that spent seeking federal approvals.¹⁷² In some cases, negotiations have been ongoing for over 30 years

169 [Brief](#) presented by the Atikamekw Nation Council, 28 September 2017.

170 [Brief](#) presented by the British Columbia Treaty Commission, 25 September 2017.

171 INAN, [Evidence](#), 25 September 2017, 1345 (Charlie Cootes).

172 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild).

with no agreement in sight, which most witnesses found unacceptable. For example, Mr. Eyford said that, while modern treaties are complex, “they shouldn’t take any more than three to five years to complete.”¹⁷³ INAC officials acknowledged that the process was too long but would not comment on what the “right” amount of time is for negotiations to take, saying that they “take the time that they take.”¹⁷⁴

Among Indigenous groups who have filed comprehensive land claims, such delays test their confidence in the process.¹⁷⁵ The Committee heard from Benji Denechezhe who said that the Northlands Denesuline First Nation has been waiting for justice for so long that the negotiators who started the process passed away before concluding an agreement with Canada.¹⁷⁶ In their brief to the Committee, the Ghotlenene K’odtineh Dene said:

An entire generation has watched and waited for a fair recognition of Ghotlenene K’odtineh Dene rights north of 60. Those who were middle aged when the claim was filed are now Elders, pre-schoolers are young adults and most of the Elders who encouraged their people to stand up for recognition of their rights in the early 1990s have died.¹⁷⁷

INAC officials noted that to reduce delays and reach a final agreement more quickly, the Minister of Crown-Indigenous Relations is able to expedite negotiations at certain stages of the process on the recommendation of a federal steering committee composed of assistant deputy ministers: “[t]hese steps will help maintain momentum at negotiating tables and serve to truncate the federal role in the negotiation process, which should help Indigenous groups benefit from agreements sooner.”¹⁷⁸ However, departmental officials did not comment on whether the comprehensive land claims policy would be subject to a comprehensive review in order to reach agreements sooner. According to AFN, rather than carrying out a review, the department has shifted toward an “exploratory process” or “rights and recognition tables.”¹⁷⁹

173 INAN, [Evidence](#), 26 October 2017, 1235 (Douglas Eyford).

174 INAN, [Evidence](#), 17 October 2017, 1235 (Joe Wild).

175 [Brief](#) presented by the Atikamekw Nation Council, 28 September 2017.

176 INAN, [Evidence](#), 27 September 2017, 1100 (Benji Denechezhe).

177 [Brief](#) presented by the Ghotlenene K’odtineh Dene, 27 September 2017.

178 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild).

179 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.



(i) Negotiators' mandate and turnover

One of the factors contributing to delays in negotiations is the frequent turnover of federal negotiators at the negotiation tables. Negotiators spend on average seven years negotiating a single agreement.¹⁸⁰ With an average negotiating time of 18 years, several negotiators will work on the same file, resulting in “lost momentum”¹⁸¹ and further increasing delays. Indigenous witnesses said that they have to start over each time the negotiator changes.¹⁸² New negotiators who arrive in the middle of the negotiations are often untrained or unfamiliar with the unique characteristics of the Indigenous community they are negotiating with. INAC officials admitted this can mean “significant time spent to bring a new negotiator up to speed.”¹⁸³

The Committee also heard that the mandate of federal negotiators, which determines what they can offer, negotiate and include in the treaties, is generally not flexible enough for negotiations to move forward quickly. Moreover, according to Robert Janes from the Te'mexw Treaty Association, the “process of actually getting any mandate change from the federal government is painfully slow.”¹⁸⁴ Federal negotiators do not have any real decision-making authority and must return to each federal agency for approval in order to make an offer on any matter. Grand Chief Awashish compared the negotiations to a cat and mouse game: “[w]e ask for certain things from our negotiators, they propose objectives and recommendations at the negotiating table. But when they arrive at the table, the door is closed and they are told that that is not part of the mandate.”¹⁸⁵ According to the Grand Chief, the government's approach to negotiators' mandates is far too rigid:

Negotiators at Canadian central tables are following a negotiation framework, and they cannot depart from it. That often causes problems from one region to another. Certain approaches may work for someone in British Columbia or in the Northwest Territories, but not elsewhere. The coast-to-coast approach does not work.¹⁸⁶

INAC senior officials acknowledged the limitations of the government's approach: the pre-defined mandates and policy frameworks prevent negotiators from diverging in any

180 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild).

181 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild).

182 INAN, [Evidence](#), 28 September 2017, 0815 (Eleanor Bernard); 0825 (Grand Chief Constant Awashish).

183 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild).

184 INAN, [Evidence](#), 25 September 2017, 1035 (Robert Janes).

185 INAN, [Evidence](#), 28 September 2017, 0810 (Grand Chief Constant Awashish).

186 INAN, [Evidence](#), 28 September 2017, 0845 (Grand Chief Constant Awashish).

way from pre-established criteria.¹⁸⁷ According to some witnesses, the negotiators' mandate must be clear and transparent and the negotiation process open and rational to ensure "fewer delays and disappointments."¹⁸⁸

(ii) Overlapping claims

In its study, the Committee learned that there are often overlaps in various claims. In its interim policy on comprehensive land claims, INAC explained that overlapping claims result when "more than one Aboriginal group has potential or established Aboriginal or treaty rights in the same geographical area."¹⁸⁹ This situation causes disputes that in turn prolong negotiations and delay the conclusion of treaties. According to Ms. Haldane, the Chief Commissioner of the British Columbia Treaty Commission, overlap disputes "interfere with the implementation of the [United Nations] declaration by disrupting negotiations and slowing the advancement and implementation of treaties and reconciliations in general."¹⁹⁰ As mentioned in chapter one, article 37 of the United Nations Declaration on the Rights of Indigenous Peoples provides that states must honour and respect treaties, agreements and other constructive arrangements concluded with Indigenous peoples.¹⁹¹

Several witnesses pointed out that the problems of territorial boundaries result from differing interpretations of land. Some witnesses explained that "overlap" is a colonial term based on the concept of "us and them." Overlap "just meant that the land was good, that we shared it well, and that it was good places to go."¹⁹² Other witnesses supported this interpretation, saying that the boundaries causing problems "are not the boundaries of Indigenous people;"¹⁹³ they are "outside boundaries."¹⁹⁴ The rigidity of the process also prevents claims from being settled when several groups share the same territory.

The Committee was told that the government should let Indigenous peoples sort out these problems themselves. Witnesses said that Indigenous peoples have their own

187 INAN, *Evidence*, 17 October 2017, 1225 (Joe Wild).

188 *Brief* presented by the Atikamekw Nation Council, 28 September 2017.

189 INAC, *Renewing the Comprehensive Land Claims Policy*, September 2014, p. 15.

190 INAN, *Evidence*, 25 September 2017, 0900 (Celeste Haldane).

191 United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*.

192 INAN, *Evidence*, 27 September 2017, 1125 (Jason Madden).

193 INAN, *Evidence*, 27 September 2017, 1130 (Wayne Wysocki).

194 INAN, *Evidence*, 27 September 2017, 1130 (Barry Hunter).



mechanisms to settle “overlap” issues and that, if Indigenous peoples are where they are today, it’s because these mechanisms have historically worked well.¹⁹⁵ For example, when various groups had differences about the same area, the Elders served as mediators. Witnesses believe that Indigenous groups must be left to sort out land occupation issues among themselves before Canada should consider negotiating a treaty with them.¹⁹⁶ According to Ms. Haldane:

Indigenous peoples are best placed to resolve overlapping and shared territory issues amongst themselves. These issues and their resolution have been a part of traditional Indigenous governance for thousands of years. It's an essential function for self-determination and self-governance.¹⁹⁷

b. Certainty and surrender of rights

Through the negotiation of modern treaties, Canada aims to achieve certainty over rights to lands and resources. Historically, the concept of certainty has been linked to Indigenous peoples ceding, releasing or surrendering some of their rights.¹⁹⁸ Today, the government speaks instead of modified rights, the suspension of rights, or the non-assertion or non-exercise of rights. Despite this change in terminology, the result is largely the same: the “Crown continues to require the extinguishment of Section 35 rights.”¹⁹⁹

First Nations representatives who appeared before the Committee explained that they understand the concept of certainty as requiring them to waive their inherent rights. Grand Chief Dumas said that the guise of certainty conceals the desire to extinguish Indigenous peoples’ rights under section 35 of the *Constitution Act, 1982*.²⁰⁰ According to the Sub-Chief Sam Gargan of the Deh Gah Got’ie First Nations, certainty benefits only the federal government: “the federal government wants that certainty clause for themselves, but it doesn't say anything about our certainty in the final agreement.”²⁰¹ The certainty of extinguishment benefits Canada because it provides predictability. Yet it is unclear what Indigenous peoples get out of it. It is also unlikely that making the extinguishment of rights a condition for settling claims is consistent with a nation-to-

195 INAN, [Evidence](#), 23 October 2017, 1130 (Chief Bill Erasmus).

196 Ibid.

197 INAN, [Evidence](#), 25 September 2017, 0900 (Celeste Haldane).

198 Douglas Eyford, [A New Direction: Advancing Aboriginal and Treaty Rights](#), April 2015, p. 70.

199 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

200 INAN, [Evidence](#), 27 September 2017, 0815 (Grand Chief Arlen Dumas).

201 INAN, [Evidence](#), 23 October 2017, 0840 (Sub-Chief Sam Gargan).

nation relationship of equals. Ms. Haldane said that “[t]he notion of extinguishment has been rejected outright by Indigenous peoples participating in negotiations and has no place in modern-day treaties.”²⁰² Many witnesses “support the movement away from extinguishment”²⁰³ and asked to eliminate “altogether any aspect of extinguishment as a factor of treaty-making.”²⁰⁴

Witnesses said that treaty signatories need to be given some room to allow their relationship to evolve. Melissa Louie, a legal and policy advisor with the First Nations Summit, said that her organization is “moving away from terms like “final agreement”” because “treaties are meant to be evolving; that there is not a final relationship.”²⁰⁵ According to the Maa-nulth Chiefs, “treaties [are] living documents and, as such, [have] to be revisited on a regular basis in order to determine the health of the relationship.”²⁰⁶ Many witnesses said that treaties should be seen as living trees.²⁰⁷ With a view to striking a balance between predictability and flexibility, the living tree model takes a progressive interpretation of the Constitution, as it can change and adapt over time. This model could allow certain treaty provisions to be reviewed on an on-going basis, where necessary.

c. Negotiation funding

A specific issue in the comprehensive land claims process which many witnesses raised is funding, which currently consists of a combination of repayable loans and non-repayable contributions. According to the First Nations Summit, in 2016, negotiation loans totaled \$528 million in British Columbia alone.²⁰⁸ For all of Canada, the outstanding principal and interest for comprehensive claim negotiation loans was \$817 million in January 2013.²⁰⁹

INAC officials told the Committee that loans were originally thought to encourage the parties to move the negotiations forward: “there’s a clear recognition, based on the

202 INAN, [Evidence](#), 25 September 2017, 0900 (Celeste Haldane).

203 INAN, [Evidence](#), 25 September 2017, 0955 (Celeste Haldane).

204 INAN, [Evidence](#), 25 September 2017, 1020 (David Schaepe); 1055 (Jean Teillet); INAN, [Evidence](#), 24 October 2017, 1125 (Chief Jean-Guy Whiteduck).

205 INAN, [Evidence](#), 25 September 2017, 0950 (Melissa Louie).

206 [Brief](#) presented by the First Nations of the Maa-nulth Treaty Society, 25 September 2017.

207 INAN, [Evidence](#), 25 September 2017, 0955 (Celeste Haldane); 1020 (David Schaepe).

208 [Brief](#) presented by the First Nations Summit, 25 September 2017.

209 INAC, [Audit of Management of Negotiation Loans](#), January 2013.



experience over the last 20 to 30 years, that that's not the case. The loans don't actually provide any real incentive to move things along more quickly at the table."²¹⁰

In fact, the Committee heard that the funding model impedes the process and could increase the length of negotiations. Loan funding has created debt problems for Indigenous groups. According to Mr. Eyford, the "debt in some communities is so overwhelming that they're afraid to pull out of the process because they have a requirement to repay the debt."²¹¹ Other witnesses said there is "tremendous uncertainty regarding what happens to the debt if the parties are unable to reach a treaty."²¹² In all cases, the funding model is a "huge disincentive"²¹³ for many communities.

According to witnesses, the amount owed Canada by the claimant group is deducted from the final capital transfer payment, which "erodes the net value of the treaty."²¹⁴ Other witnesses said that loan funding creates vulnerability for Indigenous communities.²¹⁵ Charlie Cootes said that these loans have "proved to be both a political and an economic hardship," which he finds unfair: "First Nations should not be required to pay to solve a problem they did not create, a problem that has had profound adverse effects upon our communities for generations."²¹⁶ This model is also sometimes applied in an unequal manner, resulting in some communities being forced to assume the debt of others who have withdrawn from the process. As Jean Teillet from the Sto:lo Xwexwilmexw Treaty Association pointed out:

We started off with 19 bands in treaty. Along the way, because of the length of time and the absolute intransigence on the part of the federal mandate to move anything other than throwing something down on the table and not negotiating ... a lot of bands left in frustration, and the whole thing collapsed in 2005. Then six wanted to come back, and Canada insisted that the six had to assume the debt of all the other 13 bands that left or they wouldn't let us come back into the treaty process. We have about a \$13-million debt, and it's not even ours, but there is an insistence that we're supposed to pay that. I regard that as highway robbery.²¹⁷

210 INAN, [Evidence](#), 17 October 2017, 1210 (Joe Wild).

211 INAN, [Evidence](#), 26 October 2017, 1235 (Douglas Eyford).

212 INAN, [Evidence](#), 25 September 2017, 0920 (Cheryl Casimer).

213 INAN, [Evidence](#), 25 September 2017, 1025 (David Schaepe).

214 INAN, [Evidence](#), 25 September 2017, 0920 (Cheryl Casimer).

215 INAN, [Evidence](#), 26 October 2017, 1110 (Chief Harry St. Denis).

216 INAN, [Evidence](#), 25 September 2017, 1350 (Charlie Cootes).

217 INAN, [Evidence](#), 25 September 2017, 1045 (Jean Teillet).

The British Columbia Treaty Commission also believes it is impossible to establish a renewed fiscal relationship and promote reconciliation “with large loan indebtedness hanging over Indigenous peoples during treaty negotiations, and during implementation of a new relationship.”²¹⁸ INAC officials are aware that Indigenous communities have concerns about the funding model and that alternatives need to be examined to address the debt issue.²¹⁹ However, they did not indicate whether the Department was currently taking any action in this regard.

d. Implementation of agreements

Even though Indigenous peoples have to go into multi-million dollar debt and negotiate for about 18 years to conclude a treaty, witnesses stated that there are several barriers to the implementation of agreements. This is a particularly important issue since “[g]etting land claim settlements in place is a form of justice”²²⁰ for Indigenous peoples. Witnesses said that not implementing agreements is counterproductive.²²¹ Canada must take these issues into account because non-compliance with treaty obligations undermines reconciliation and violates article 37 of the United Nations Declaration on the Rights of Indigenous Peoples. Witnesses also suggested that limited means are available to ensure treaties are implemented, which further exacerbates other issues.

(i) Implementation funding

According to Ms. Kotierk, having a plan is one thing, but you also need to have the resources to support and implement the plan, “and those things have not been forthcoming.”²²² The Committee heard from the Inuvialuit Regional Corporation that, since signing their treaty in 1984, they “have received only nominal amounts to support the management of implementation.”²²³ Witnesses said that it was not just the level of funding that was important: “the form of funding can be a constraint upon or a catalyst to implementation.”²²⁴ Mr. Ningaqsik Smith said that longer-term flexible funding arrangements would be more effective.

218 [Brief](#) presented by the British Columbia Treaty Commission, 25 September 2017.

219 INAN, [Evidence](#), 17 October 2017, 1210 (Joe Wild).

220 INAN, [Evidence](#), 23 October 2017, 0900 (Bill Enge).

221 INAN, [Evidence](#), 19 October 2017, 1135 (Aluki Kotierk).

222 INAN, [Evidence](#), 19 October 2017, 1125 (Aluki Kotierk).

223 INAN, [Evidence](#), 23 October 2017, 0935 (Duane Ningaqsik Smith).

224 INAN, [Evidence](#), 23 October 2017, 0940 (Duane Ningaqsik Smith).



Chief Bill Erasmus said some Indigenous groups who have concluded a modern treaty with Canada are forced to use their own money rather than the funds from the agreement to address infrastructure and service issues.²²⁵ According to the Hon. Ethel Blondin-Andrew, Chair of the Sahtu Secretariat, a “claim is good, but the implementation and the resources to do so are even more important.”²²⁶ Like other witnesses, she believes that a good implementation plan is essential if these modern treaties are to deliver positive outcomes.

(ii) Problems related to the implementation of agreements

Witnesses told the Committee that the Land Claims Agreement Coalition, which represents Indigenous groups that have signed a modern treaty with Canada, was established in 2003 when they “recognized that [their] land claims agreements were not being implemented.”²²⁷ According to Ms. Teillet, once the treaties are signed, they “get filtered onto the other side of the treaty process, where people forget or don't know what's in the treaty, and they don't understand the relationship of the treaty to what they're doing.”²²⁸ Likewise, Ms. Clayton said “[t]oo often, it has seemed as though as soon as the ink is dry on a modern treaty, all government officials forget about their solemn obligations and move on to other things.”²²⁹ Mr. Eyford also believes that “Canada has fallen behind in implementing treaty commitments,”²³⁰ as does Mr. Obed, who said “[w]e still struggle with going from the provisions within our agreements into the reality that was imagined within them.”²³¹

Witnesses identified several causes for these problems. For example, there are gaps in corporate memory, and staff turnover in federal departments makes implementing the agreements difficult.²³² Auditor General Michael Ferguson suggested that INAC “did not have an effective system to track the status of the federal government’s obligations” under the Labrador Inuit Land Claims Agreement.²³³ According to him, having a mechanism to inventory and monitor the federal government’s obligations under the

225 INAN, [Evidence](#), 23 October 2017, 1025 (Chief Bill Erasmus).

226 INAN, [Evidence](#), 23 October 2017, 1100 (Hon. Ethel Blondin-Andrew).

227 INAN, [Evidence](#), 19 October 2017, 1130 (Aluki Kotierk).

228 INAN, [Evidence](#), 25 September 2017, 1110 (Jean Teillet).

229 INAN, [Evidence](#), 25 September 2017, 1145 (Eva Clayton).

230 INAN, [Evidence](#), 26 October 2017, 1225 (Douglas Eyford).

231 INAN, [Evidence](#), 24 October 2017, 1205 (Natan Obed).

232 INAN, [Evidence](#), 25 September 2017, 1210 (Corinne MacKay).

233 INAN, [Evidence](#), 17 October 2017, 1105 (Michael Ferguson).

various treaties “is very critical to the department's management of the federal government's obligations under these treaties.”²³⁴ Other witnesses mentioned that the post-treaty relationship suffers from the lack of a federal policy on implementation and the fact that no independent review body separate from INAC is responsible for monitoring its implementation.²³⁵ Bertha Rabesca Zoe, legal counsel with the Tlicho Government, said that there is a “need for government to be more active partners in the implementation of modern treaties,” especially if there is a desire to continue along the path to reconciliation.²³⁶

All of this also relates to treaties being seen as living documents, signaling the beginning of a relationship, not an end.²³⁷ According to Mr. Ningaqsiq Smith, “[w]e have to keep in mind that these modern-day treaties are living documents. We can't be expected to sign them and go away, expecting a we're-done-so-leave-us-alone mentality.”²³⁸

Mr. Obed said:

The challenge is that when provisions in the land claim agreement are put to a test and they perhaps are put into action, it seems as though there are more restrictive interpretations on the federal government side and more expansive interpretations on the Indigenous proponents' side. I would imagine that is simply the way in which we have thought about land claim implementation, which still is adversarial in many ways and one of a business negotiation rather than a shared path towards a better future.²³⁹

Witnesses also pointed out that periodic reviews and binding arbitration may be useful in certain situations.²⁴⁰ Indigenous groups that have negotiated a comprehensive land claim in the past want to build in a degree of flexibility in the implementation of a treaty²⁴¹ and believe it is sometimes necessary to rethink certain provisions in order to make it more flexible and adapted to actual needs.²⁴² These treaties mark the beginning of a relationship that must sometimes be revisited for the sake of equity and effectiveness. Despite the problems and gaps identified by various witnesses,

234 INAN, [Evidence](#), 17 October 2017, 1155 (Michael Ferguson).

235 INAN, [Evidence](#), 25 September 2017, 1210 (Margaret Rosling); 1215 (Corinne MacKay); INAN, [Evidence](#), 23 October 2017, 0940 (Duane Ningaqsiq Smith).

236 INAN, [Evidence](#), 23 October 2017, 1035 (Bertha Rabesca Zoe).

237 INAN, [Evidence](#), 26 October 2017, 1300 (Douglas Eyford).

238 INAN, [Evidence](#), 23 October 2017, 0945 (Duane Ningaqsiq Smith).

239 INAN, [Evidence](#), 24 October 2017, 1225 (Natan Obed).

240 INAN, [Evidence](#), 19 October 2017, 1115 (Aluki Kotierk).

241 [Brief](#) presented by the First Nations of the Maa-nulth Treaty Society, 25 September 2017.

242 [Brief](#) presented by the Naskapi Nation of Kawawachikamach, 24 October 2017.



Ms. Kotierk does not regret that her community, the Inuit of Nunavut, signed a modern treaty with the Government of Canada. In her words:

It gave us a sense of hope.... The problem we have is with the implementation of it. I think that if we were able to implement it, then we would achieve the dream, and it would be positive in that sense.²⁴³

CHAPTER FOUR: SELF-GOVERNMENT AGREEMENTS

A. Introduction

Self-government agreements provide Indigenous communities with greater control over their internal affairs, allowing them to deliver programs and services that are more responsive to community needs. These agreements include provisions related to the structure of Indigenous governments, law making authorities and fiscal transfers, and cover a range of areas including education, health, social services, culture, membership, land management, and policing.²⁴⁴ Negotiated self-government agreements are ratified through federal legislation. There are two primary types of self-government agreements:

- self-government agreements, which cover a range of areas and remove the community from most applications of the *Indian Act*; and
- sectoral self-government agreements, which focus on transferring jurisdiction or authority in one area, such as education.

To this day, Canada has signed 22 self-government agreements that involve 36 Indigenous communities across Canada. Of those, 18 are part of a comprehensive land claim agreement.²⁴⁵

a. Federal self-government policy

The need to recognize Indigenous self-government was highlighted in the 1983 report of a special committee of the House of Commons on Indian Self-Government (the Penner Report), which recommended that the inherent right to self-government be explicitly stated in the constitution, and that First Nations be recognized as a distinct order of

243 INAN, *Evidence*, 19 October 2017, 1150 (Aluki Kotierk).

244 Indigenous and Northern Affairs Canada, *Fact Sheet: Aboriginal Self-Government*; Mary C. Hurley, *Aboriginal Self-Government*, Publication No. PRB 09-23E, Ottawa, Parliamentary Information and Research Service, Library of Parliament, 15 December 2009.

245 INAC, *Fact Sheet: Aboriginal Self-Government*.

government. Further, the 1992 Charlottetown Accord included provisions that would have recognized Indigenous peoples in Canada as having an inherent right to self-government, though these proposed constitutional amendments ultimately failed.²⁴⁶

Despite these recommendations, the current policy on self-government was established in 1995 when the federal government created *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*²⁴⁷ (known as the Inherent Right policy). This policy recognizes the inherent right to self-government as an existing right under section 35 of the *Constitution Act, 1982*, and that operates within the Canadian jurisdictional and constitutional framework. The policy's underlying objectives are to "build a new partnership with Aboriginal peoples and to strengthen Aboriginal communities by supporting stable and sustainable Aboriginal governments and greater self-reliance."²⁴⁸

b. Financial arrangements

Financial arrangements are negotiated to help Indigenous governments and institutions deliver services to members of communities with self-government agreements. Bilateral and trilateral negotiations on these financial arrangements were initially held between Indigenous communities, the federal government and sometimes the provincial or territorial government. Financial arrangements were negotiated separately among communities, and as such, there was variation in the terms and scope of the funding among communities.²⁴⁹

In 2014, following the engagement sessions, the federal government indicated that it was moving towards a new approach to funding self-government agreements, including those under comprehensive land claims agreements. Importantly, changes to the policy included features such as a common funding formula that takes into consideration own-source revenues to calculate financial transfers to Indigenous governments.²⁵⁰ Own-source revenue is the revenue that an Indigenous government raises by collecting taxes and

246 Mary C. Hurley, *Aboriginal Self-Government*, Publication No. PRB 09-23E, Ottawa, Parliamentary Information and Research Service, Library of Parliament, 15 December 2009.

247 INAC, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*.

248 INAC, *General Briefing Note on Canada's Self-Government and Comprehensive Land Claims Policies and the Status of Negotiations*.

249 INAC, *Engagement Sessions on a New Approach to Fiscal Arrangements with Aboriginal Self-Government*.

250 INAC, *Backgrounder- A New Approach to Fiscal Arrangements with Aboriginal Self-Government*; Indigenous and Northern Affairs Canada, *General Briefing Note on Canada's Self-Government and Comprehensive Land Claims Policies and the Status of Negotiations*.



resource revenues or by generating business and other income.²⁵¹ Specifically, *Canada's Fiscal Approach for Self-Government Arrangements* states that, in the long term, "Canada expects to develop more formula-based methodologies" and "may seek to coordinate the termination year of agreements to establish a common renewal cycle."²⁵²

INAC announced that since 1 April 2017, funding reductions under its own-source revenue policy for self-government agreements are being suspended for up to three years to ensure that Indigenous governments are able to allocate all of their resources to the need of their communities.²⁵³ INAC noted that during this time the federal government would work with self-governing Indigenous governments to develop a new funding policy.²⁵⁴

B. Benefits of self-government

Many witnesses said there are significant benefits to self-government agreements, including giving Indigenous self-governments more latitude than is possible under the *Indian Act*, and ensuring self-sufficiency and the application of systems of governance and education specific to different nations.²⁵⁵

The Westbank First Nation said that since its agreement was implemented in 2005, the community has prospered both socially and economically, generating major investment and having a "more stable and predictable" government.²⁵⁶ Christopher Derickson said that this level of certainty in the governance structure has increased the population and encouraged investors to come in to the community.²⁵⁷ Because of this economic growth, the Westbank First Nation has been able to reduce its reliance on federal transfers.²⁵⁸

The Committee was also told about the benefits of self-government in the context of sectoral agreements: the Mi'kmaw Kina'matnewey, a regional management organization with a sectoral self-government agreement in education in Nova Scotia, is having

251 INAC, [*Own-source revenue for self-governing groups*](#).

252 INAC, [*The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*](#).

253 INAC, [*Own-source revenue for self-governing groups*](#).

254 Ibid.

255 INAN, [*Evidence*](#), 25 September 2017, 0945 (Cheryl Casimer); 1150 (Christopher Derickson); INAN, [*Evidence*](#), 28 September 2017, 0815-0820 (Eleanor Bernard).

256 [*Brief*](#) presented by the Westbank First Nation, 25 September 2017.

257 INAN, [*Evidence*](#), 25 September 2017, 1150 (Christopher Derickson).

258 Ibid.

success. Data collected by Mi'kmaw Kina'matnewey member communities shows a yearly increase in the number of graduates and higher literacy and numeracy rates.²⁵⁹

In addition to the economic and educational benefits, witnesses also pointed to the positive impact that self-government agreements can have by allowing communities to get out from under the *Indian Act*.²⁶⁰ The Tsawwassen First Nation, which concluded a modern treaty that provided for self-government in many sectors such as natural resources, education and health care, told the Committee it has been able to take advantage of numerous economic development opportunities since implementing self-government. The Tsawwassen First Nation said that, prior to implementation, limitation in the *Indian Act* made it practically impossible for them to develop their land.²⁶¹

The Committee also heard that despite these benefits, some communities have been unable to negotiate self-government agreements.²⁶² This is the case, for example, for the Liard First Nation, one of three First Nations that has not signed a self-government agreement in the Yukon.²⁶³ They explained what self-government would mean for their community, including the ability to manage public services and having governance and financial management capacity. They said that rejecting this agreement had put them “back into the dysfunction that comes from having relationships with Canada and other governments encumbered by the *Indian Act*,”²⁶⁴ which puts them at a disadvantage relative to other First Nations with self-government agreements.²⁶⁵ The absence of a self-government agreement has led to hardship for the Liard First Nation, including social problems such as students dropping out of school, substance abuse, family violence and a high mortality rate among youth.²⁶⁶

C. Funding self-government

Once a self-government agreement is concluded, witnesses pointed out that the funding for its implementation is a barrier to the economic prosperity and social well-being of

259 INAN, [Evidence](#), 28 September 2017, 0815; 0820 (Eleanor Bernard).

260 Based on Committee analysts' notes from the trip to Delta, British Columbia, 25 September 2017; [Brief](#) presented by the Westbank First Nation, 25 September 2017.

261 Based on Committee analysts' notes from the trip to Delta, British Columbia, 25 September 2017.

262 INAN, [Evidence](#), 23 October 2017, 1125 (Chief Bill Erasmus).

263 INAC, [Building the Future: Yukon First Nation Self-Government](#).

264 [Brief](#) presented by the Liard First Nation, 26 October 2017.

265 Ibid.

266 Ibid.



Indigenous signatories. As Bertha Rabesca Zoe said, for self-government agreements to be effective, they must receive adequate funding based on actual costs.²⁶⁷

Mr. Derickson told the Committee that, despite the positive effects of self-government on the community, the Westbank First Nation now faces new fiscal challenges in its relationship with the federal government.²⁶⁸ He said that the Westbank First Nation cannot provide the same level of services that a municipality can because of the current funding approach. It cannot collect certain sources of revenue like the gas tax²⁶⁹ and current funding does not take population growth into account. In this regard, Mr. Derickson said that the federal government needs to modernize its funding approach to support the implementation of self-government in order to keep pace with rising economic and population growth and ensure the same level of service delivery as a municipality.²⁷⁰ In this vein, Mr. Derickson said it would be beneficial to develop a new fiscal relationship, including revenue-sharing agreements. While the Westbank First Nation and other First Nations are currently in negotiations on recognition of rights and self-determination, among other things, reaching a new approach to funding governments should be a priority for the federal government.

Issues relating to the funding of self-government agreements were also raised in the context of sectoral agreements. Eleanor Bernard, Executive Director of Mi'kmaw Kina'matnewey, said that, despite the positive effects on education from the sectoral agreement, "success is being punished"²⁷¹ by financial barriers that followed. Ms. Bernard raised a number of issues related to the negotiation of funding agreements including the lack of a negotiation mandate, the frequent turnover of federal negotiators, and the resulting delays in the negotiations. Ms. Bernard also raised issues related to the funding Mi'kmaw Kina'matnewey is entitled to receive under its sectoral agreement.²⁷²

267 INAN, [Evidence](#), 23 October 2017, 1035 (Bertha Rabesca Zoe).

268 INAN, [Evidence](#), 25 September 2017, 1150 (Christopher Derickson).

269 The gas tax fund is a source of federal revenue provided to provinces and territories, who, in turn flow this funding to their municipalities to support local infrastructure. Self-governing Indigenous governments do not currently receive the gas tax fund. Infrastructure Canada, [The Federal Gas Tax Fund](#).

270 INAN, [Evidence](#), 25 September 2017, 1150 (Christopher Derickson).

271 INAN, [Evidence](#), 28 September 2017, 0815 (Eleanor Bernard).

272 Ibid. Ms. Bernard said that Mi'kmaw Kina'matnewey was eligible for only 3 out of the 10 subactivities in the 2016 federal budget. She said that this share of funding (30%) was troublesome, since the organization expected to receive a proportionate share of the enhanced funding that the federal government provides to other Indigenous communities, based on the terms of their agreement.

PART TWO: CONCLUSIONS AND RECOMMENDATIONS

Throughout the study, the Committee heard that settling claims benefits Indigenous peoples, and provides Indigenous communities with the opportunity to address longstanding concerns while working towards a better life for future generations. In the words of Chief Wayne McKenzie of the Timiskaming First Nation, “resolution of these claims is essential to our legal, economic and cultural survival.”²⁷³

The Committee believes that the specific claims and comprehensive land claims processes are an important part of reconciliation. We were concerned by testimony about the difficulties Indigenous communities experience in achieving fair and just resolution of their claims under these processes. In the case of comprehensive land claims, witnesses emphasized that the work to resolve a claim can be ongoing for multiple generations, with community members initially involved passing away before an agreement is reached. With regard to specific claims, the Committee heard that the federal approach is adversarial and the process lacks independence and transparency, in many cases preventing First Nations from reaching agreements. It is clear that in their current form, these processes often prevent Indigenous communities from reaching a just and fair resolution of their claims.

The Committee remains hopeful that this situation can be addressed through concrete reforms to the specific claims and comprehensive land claims processes, including moving towards a rights recognition approach for the resolution of comprehensive land claims. Given the importance of these claims to reconciliation, any reforms must take place in partnership with Indigenous peoples. Drawing on the important testimony provided by witnesses, the following sections set out practical recommendations with a view to ensuring that specific claims and comprehensive land claims processes are just, equitable and fair.

A. Framework for resolving comprehensive land claims

The federal government has committed to renewing its relationship with Indigenous peoples based on “the recognition of rights, respect, co-operation and partnership.”²⁷⁴ Witnesses suggested that the current comprehensive land claims policy and process are

273 INAN, *Evidence*, 26 October 2017, 1105 (Chief Wayne McKenzie).

274 INAN, *Evidence*, 19 September 2017, 1100 (Perry Billingsley).



inconsistent with an approach based on rights recognition,²⁷⁵ since they have been “based on the denial of Aboriginal rights and title” for far too long.²⁷⁶ The Committee agrees with witnesses and is firmly of the view that the federal government’s handling of negotiation mandates and approach to extinguishment of Aboriginal title are in urgent need of reform to ensure that the policy and process are based on rights recognition.

To ensure a focus on rights recognition, the federal government should address concerns regarding the extinguishment of Aboriginal title. The Committee heard that the practice of extinguishing Aboriginal title is incompatible with a rights recognition approach and was rejected by Indigenous peoples participating in negotiations.²⁷⁷ The Committee believes that eliminating the extinguishment requirement for Indigenous communities would reduce the time spent in negotiations and enable more Indigenous communities to participate in the process. For these reasons, the Committee concurs that the federal government should remove the extinguishment requirement from the comprehensive land claims policy.

Another way to ensure the comprehensive land claims process reflects a rights recognition approach includes improving the process for obtaining negotiation mandates. Negotiations take on average 18 years to complete, with two of these years spent “seeking federal approvals.”²⁷⁸ Lengthy negotiations have a significant impact on Indigenous communities, who may assume greater levels of debt and lose hope of ever reaching an agreement. Witnesses told the Committee that delays in the negotiation process can partially be attributed to the inflexible mandate of negotiators which prevents the process from moving more quickly.

The Committee heard that INAC has taken steps to streamline the federal approvals process for negotiation mandates, by granting the Minister of Crown-Indigenous Relations and Northern Affairs the authority to sign preliminary agreements and agreements in principle on recommendation of a federal steering committee. Although this work is encouraging, the Committee is of the view that negotiators could be provided with more flexible negotiation mandates and broader discretion. These reforms could reduce unnecessary delays, encourage collaboration, lead to the development of relationships between the parties, and reinforce the work taking place

275 [Brief](#) presented by the Assembly of First Nations, 27 October 2017; INAN, [Evidence](#), 25 September 2017, 1020 (David Schaepe); 1155 (Christopher Derickson).

276 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

277 INAN, [Evidence](#), 25 September 2017, 0900 (Celeste Haldane).

278 INAN, [Evidence](#), 17 October 2017, 1205 (Joe Wild).

at Recognition of Rights discussion tables. For these reasons, the Committee recommends:

Recommendation 1

That Indigenous and Northern Affairs Canada adopt a holistic approach to comprehensive claims resolution that emphasizes community success and sustainability. That in support of this new approach, Indigenous and Northern Affairs Canada work in partnership with Indigenous peoples to reform how it establishes negotiation mandates to reflect the fact that an agreement should represent a framework that is rooted in a recognition of rights approach for a renewed and on-going relationship between the Crown and Indigenous peoples. This new approach should include, but not be limited to:

- **Continuing to implement a flexible approach for the development of negotiation mandates, which reflects and reinforces the results of the discussions with impacted parties at rights and recognition tables, in addition to recognizing that a one-size-fits-all policy for the country will not work;**
- **Broadening discretion for negotiators in their mandates to better facilitate reaching consensus, reduce unnecessary delay and promote reconciliation; and**
- **Ending the practice of requiring Indigenous rights holders to agree to extinguish their inherent and/or treaty rights as a prerequisite for an agreement as this fails to reflect both the on-going nature of the renewed relationship and the recognition of rights approach.**

B. Recognition of Rights discussion tables

Many witnesses proposed moving towards a ‘rights recognition model’ as a solution to address the difficulties experienced under the comprehensive land claim and specific claim processes. The Committee heard that INAC established Recognition of Rights discussion tables in 2015. These tables enable the Indigenous peoples and the Government of Canada to jointly develop negotiation mandates for cabinet approval. INAC representatives identified Recognition of Rights discussion tables as an innovative solution intended to expedite the negotiation of comprehensive land claims. However, according to the Assembly of First Nations (AFN), this process represents a shift in INAC’s



approach to the resolution of comprehensive land claims as the department is operating outside of the comprehensive land claims policy.²⁷⁹

The Committee was encouraged by the recent release of information, notably the list of participating communities, related to the Recognition of Rights discussion tables. While recognizing the confidential nature of discussions at these tables, the Committee believes that the department should continue to release related information in a timely manner, to ensure Indigenous communities and the public are informed about the progress of discussions and the policy framework guiding the work. Ultimately, access to information may enable more Indigenous communities to participate in these discussions and could lead to the resolution of a greater number of claims. The Committee therefore recommends:

Recommendation 2

That Indigenous and Northern Affairs Canada make information on Recognition of Rights Tables publicly available, including the policy and focus of the discussions, and that Indigenous and Northern Affairs Canada provide information to Indigenous communities on how to form a Recognition of Rights Table and provide a report to Parliament within three years on their progress.

C. Agreements are Living Documents

The Committee is also of the view that the federal government's approach to comprehensive land claims agreements needs reform. The Committee heard that when a comprehensive land claim is completed, "Canada sees the relationship as having come to an end."²⁸⁰ Witnesses offered another vision whereby comprehensive land claim agreements could be viewed as living documents, and an expression of an ongoing relationship.²⁸¹ Viewing comprehensive land claims in this manner would align the policy and process more closely with a rights recognition approach and encourage the development of positive relationships between Indigenous communities and the federal government. Therefore, the Committee recommends:

279 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

280 INAN, [Evidence](#), 26 October 2017, 1300 (Douglas Eyford).

281 INAN, [Evidence](#), 25 September 2017, 1345 (Chief Charlie Cootes).

Recommendation 3

That Indigenous and Northern Affairs Canada recognize that land claims agreements are living documents and that the comprehensive land claims process be recognized as an ongoing relationship moving towards reconciliation.

D. Negotiation loan funding

“[C]laims tell stories of lands mismanaged, sold, degraded, often while communities faced poverty and struggled to secure even the most basic necessities of life.”²⁸² Given this conception of the claims process, several witnesses questioned why Indigenous communities should have to pay in an effort to address injustices carried out against them.

According to INAC, funding to enable Indigenous communities to participate in comprehensive land claim negotiations is provided as a mix of loans and non-repayable contributions.²⁸³ While this system was originally developed to incentivize the speedy resolution of claims, this outcome has not materialized and negotiations go on for many years before a settlement is reached.²⁸⁴ With few alternative routes to address their claims, Indigenous communities take on negotiation funding from INAC to participate in the process. Witnesses clearly identified these loans as a significant barrier to the fair and just resolution of comprehensive land claim and specific claims.

Due to the lengthy negotiation process, the Committee heard that Indigenous communities accumulate significant debt before they reach a settlement. The total amount of loans outstanding for comprehensive land claims negotiations is staggering, at around \$817 million.²⁸⁵ The burden weighs heavily on individual Indigenous communities; the Atikamekw Nation has accumulated \$35 million in debt after forty years in negotiations²⁸⁶ and the Essipit Innu First Nation has \$13 million in debt.²⁸⁷ Indebtedness has significant consequences for Indigenous communities, who may remain in the process despite limited progress, as withdrawing may trigger the repayment of their debts.²⁸⁸ Debt also has other effects, as it has “negatively impacted

282 [Brief](#) presented by the BC Specific Claims Working Group, 26 October 2017.

283 INAN, [Evidence](#), 17 October 2017, 1210 (Joe Wild).

284 INAN, [Evidence](#), 17 October 2017, 1210 (Joe Wild).

285 INAC, [Audit of Management of Negotiation Loans](#).

286 INAN, [Evidence](#), 26 October 2017, 1310 (Glenn Archie).

287 INAN, [Evidence](#), 28 September 2017, 1030 (Chief Martin Dufour).

288 INAN, [Evidence](#), 26 October 2017, 1235 (Douglas Eyford).



political decision-making, stability and governance” in First Nations communities in British Columbia.²⁸⁹ In the context of specific claims, the Committee heard that First Nations may settle their claims in order to avoid accumulating more debt. Further, outstanding negotiation loans can also prevent First Nations from accessing financing for “critical community needs,” such as housing and infrastructure.²⁹⁰

Given witness testimony, it is clear that the current negotiation loan funding process creates a significant power imbalance in the negotiation of claims. Indigenous communities, who have been working for decades to address injustices, may be pressured to settle their claims for financial reasons. The Committee strongly believes that this reality is unfair and contrary to reconciliation. To ensure that negotiations are more balanced for Indigenous communities, the Committee agrees with witnesses that outstanding negotiation loans for specific claims and comprehensive land claims should be forgiven. Further, the Committee believes that a system of grant financing could enable interested Indigenous communities to participate in the process, while contributing to more productive negotiations. For these reasons, the Committee recommends:

Recommendation 4

That Indigenous and Northern Affairs Canada work in partnership with First Nations to reform the funding model for the specific claims process to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven.

Recommendation 5

That Indigenous and Northern Affairs Canada work in partnership with Indigenous peoples to reform the funding model for the comprehensive claims process to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven.

Recommendation 6

That Indigenous and Northern Affairs Canada work in partnership with Indigenous peoples to reform the funding model for the Treaty Land Entitlement and Additions to Reserve processes to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven.

289 [Brief](#) presented by the First Nations Summit, 25 September 2015.

290 [Brief](#) presented by the Mishkosiminiziibiing (Big Grassy) First Nation, 19 October 2017.

E. Dispute resolution during the negotiation of comprehensive land claims

The Committee believes that independent dispute resolution mechanisms are less adversarial and have the potential to accelerate negotiations. INAC currently offers mediation as a way to resolve specific claims. The department has indicated that, if requested, this mediation service is also available for use as part of the negotiation of comprehensive land claims and self-government agreements.²⁹¹ Given the difference in policies and the scope of negotiations, the Committee is of the view that independent dispute resolution options should be separately available for each claim process. For these reasons, the Committee recommends:

Recommendation 7

That Indigenous and Northern Affairs Canada make binding arbitration, mediation, and other alternative dispute resolution mechanisms available to Indigenous communities within the comprehensive land claims process.

F. Implementation of comprehensive land claims and specific claims

In addition to providing redress for the loss of traditional territories, where honourably implemented, comprehensive land claims agreements can lead to the “protection and reconciliation of Indigenous rights.”²⁹² The Committee heard there were significant problems in the implementation of comprehensive land claims agreements possibly caused by a lack of awareness of the treaty provisions on the part of the federal government,²⁹³ employee turnover,²⁹⁴ and the limited accountability measures in place.²⁹⁵ Some of the signatories to comprehensive land claims stated that the federal government’s approach has focused on technical compliance, as opposed to the spirit and intent of agreements.²⁹⁶ Witnesses proposed different ways to improve oversight for the implementation of agreements including the development of: an inventory of

291 INAC, [Fact Sheet – Mediation Services for Claim Negotiations](#).

292 INAN, [Evidence](#), 25 September 2017, 0905 (Celeste Haldane).

293 INAN, [Evidence](#), 25 September 2017, 1210 (Corinne McKay).

294 INAN, [Evidence](#), 25 September 2017, 1215 (Corinne McKay).

295 INAN, [Evidence](#), 23 October 2017, 1040 (Grand Chief Bobbie Jo Greenland-Morgan).

296 INAN, [Evidence](#), 24 October 2017, 1205 (Natan Obed); INAN, [Evidence](#), 23 October 2017, 1105 (Grand Chief Bobbie Jo Greenland-Morgan); INAN, [Evidence](#), 25 September 2017, 1145 (Eva Clayton).



federal obligations with provisions to monitor implementation,²⁹⁷ an implementation policy and an oversight body.²⁹⁸

The Committee also heard about implementation concerns related to specific claims. The Salt River First Nation noted that with regard to their 2002 Treaty Land Entitlement Claim “Canada has failed to set aside all of the lands selected under the TSA [Treaty Settlement Agreement] as reserve land.”²⁹⁹ Further, the Salt River First Nation noted that they have faced “endless roadblocks” in implementing provisions of their agreement that provide for “continuing good faith negotiations between ourselves and the Crown for infrastructure and housing on ... Reserve.”³⁰⁰

This testimony clearly demonstrates that Canada does not fully live up to its commitments. Indigenous communities should not have to pursue implementation through the courts, a costly endeavor for them and the Government of Canada alike. The Committee is encouraged by steps the government has taken to improve implementation including the development of a Whole-of-Government Approach to the implementation of comprehensive land claims agreements, a series of principles, and a Cabinet directive. However, the Committee finds that these processes do not provide the appropriate oversight to ensure that Canada is fulfilling its commitments under comprehensive land claims agreements. For these reasons, the Committee recommends:

Recommendation 8

That Indigenous and Northern Affairs Canada develop a tracking system to ensure commitments made by the Government of Canada in comprehensive land claim or specific claim agreements are clearly documented, the progress regularly reviewed, and promptly implemented; and that an independent office be created to monitor implementation.

297 INAN, *Evidence*, 17 October 2017, 1155, (Michael Ferguson).

298 INAN, *Evidence*, 23 October 2017, 0940 (Duane Ningaqsiq Smith).

299 Brief presented by the Salt River First Nation, 26 October 2017.

300 Brief presented by the Salt River First Nation, 26 October 2017.

Recommendation 9

That Indigenous and Northern Affairs Canada work with the relevant provincial and/or territorial governments and Indigenous signatories to support Indigenous community-led data collection, with a focus on using this data to improve and accelerate the implementation of specific and comprehensive land claim agreements, and to hold government accountable for implementation of these agreements.

G. Specific claims policy reform

Unresolved specific claims continue to “perpetuate social and economic inequality” in First Nations communities.³⁰¹ They also have human costs as, in some cases, Elders have passed away before seeing the resolution of their claims.³⁰² However, in spite of these costs, many First Nations communities continue to have difficulties in resolving their claims under this process. The following section provides concrete recommendations for reform to ensure that the specific claims policy and process are more just and fair for First Nations.

a. Grounds for the assessment of specific claims

The Committee heard that not all claims based on treaty rights are eligible under the specific claims policy. The exclusion of claims based on treaty rights related to ongoing activities such as harvesting rights was described by witnesses as “arbitrary and unfair.”³⁰³ To ensure fairness and consistency within the policy, the Committee is of the view that claims related to the non-fulfilment of all treaty rights should be eligible under the specific claims policy.

b. Independent organization for the evaluation and assessment of specific claims

Witnesses raised concerns over the perceived conflict of interest in the specific claims policy and process, given that the federal government controls the development of the policy and evaluates claims involving wrongs committed by the federal government.³⁰⁴ These concerns are not new – they have been raised by First Nations and outlined in

301 [Brief](#) presented by the British Columbia Specific Claims Working Group, 26 October 2017.

302 [Brief](#) presented by the Mishkosiminiziibiing (Big Grassy) First Nation, 19 October 2017.

303 INAN, [Evidence](#), 29 September 2017, 0820 (Luke Hunter).

304 INAN, [Evidence](#), 27 September 2017, 0925 (Chief Jim Bear); [Brief](#) presented by the Innu Essipit First Nation; INAN, [Evidence](#), 25 September 2017, 0930 (Chief Judy Wilson); INAN, [Evidence](#), 25 September 2017, 1330 (Morgan Chapman); INAN, [Evidence](#), 26 September 2017, 1110 (Chief Wayne McKenzie, Chief).



numerous reports since the 1970s, including the Report of the Royal Commission on Aboriginal Peoples. However, little change has taken place, despite First Nations consistently calling for the development of an independent body to oversee the specific claims process.³⁰⁵ The same recommendations echoed throughout this study, as many witnesses called for the development of an independent process³⁰⁶ for the assessment and evaluation of specific claims. Others suggested an independent organization³⁰⁷ or commission³⁰⁸ could be created to manage and fund aspects of the specific claims process. The Committee agrees that serious consideration of the development of an independent organization is long overdue and should be explored by the federal government.

c. Valuation of specific claims

The Committee heard that the federal government determines the value of specific claims without the involvement of First Nations. The valuation of specific claims affects negotiations, since claims valued under \$3 million receive “take-it-or leave-it offers.”³⁰⁹ Given the effect that the valuation of claims has upon their resolution, the Committee believes that First Nations should be involved and supported in determining the value of specific claims.

d. Compensation for specific claims

The Committee heard concerns with the formula used by the federal government to calculate compensation for specific claims. Witnesses explained that this formula, based on “80% simple and 20% compound [interest] on lost revenue,”³¹⁰ is unreasonable, as it does not take into account factors such as loss of profit, loss of opportunity, collateral damage and cultural losses. In order to make the process fair and transparent, the Committee believes that the formula to determine compensation should be reviewed on a regular basis in partnership with First Nations. Further, the Committee agrees with witnesses that compensation criteria should be broadened to recognize the multifaceted nature of the losses experienced by First Nations.

305 [Brief](#) presented by the Assembly of First Nations, 27 October 2017.

306 INAN, [Evidence](#), 25 September 2017, 0930 (Chief Judy Wilson); INAN, [Evidence](#), 26 September 2017, 1110 (Chief Wayne McKenzie); [Brief](#) presented by the Algonquin Nation Secretariat, 26 October 2017.

307 [Brief](#) presented by the Assembly of First Nations, 27 October 2017; INAN, [Evidence](#), 26 October 2017, 1215 (Patricia Myran).

308 [Brief](#) presented by the BC Specific Claims Working Group, 26 October 2017.

309 INAN, [Evidence](#), 17 October 2017, 1110, (Michael Ferguson).

310 Quote is from INAN, [Evidence](#), 24 October 2017, 1105 (Chief Jean-Guy Whiteduck); other witnesses also discussed the 80-20 rule: INAN, [Evidence](#), 29 September 2017, 1000 (Chief R. Donald Maracle); INAN, [Evidence](#), 29 September 2017, 1025 (Ryan Lake).

Broadening the compensation criteria should also include the use of land transfers as a form of compensation, where possible. Throughout the study, the Committee heard about the importance of the land to First Nations. While the specific claims policy provides that reserve lands may be returned for claims related to unlawful surrender, witnesses noted that compensation for specific claims was almost always financial. The Committee heard that federal negotiators tend to “turn a blind eye to the land compensation component of the policy”³¹¹ and pursue financial redress.

e. \$150 million cap

The Specific Claims Tribunal can award a maximum of \$150 million in compensation. The Committee heard that this amount is too low,³¹² and “obstruct[s] access to justice” for First Nations. As a result of the limit First Nations communities may choose to pursue their claims in court.³¹³ The Committee ultimately believes that specific claims should be addressed through negotiation where possible in order to avoid litigation, which is costly to First Nations and the federal government. The Committee agrees with witnesses that the cap should be reviewed to ensure that the Specific Claims Tribunal provides a just and fair alternative to litigation for First Nations communities.

f. Recommendations to improve the process

Based on witness testimony, the Committee is of the view that urgent reforms are needed to ensure that the specific claims policy and process are fair, just and transparent. These reforms must take place in partnership with First Nation communities and take into account the loss of Indigenous laws, culture, governance, language and identity.³¹⁴

The Committee is encouraged by the involvement of the AFN in the Joint Technical Working Group on Specific Claims mandated to review the specific claims policy and make recommendations for change. However, the Committee acknowledges that First Nations have been involved in many working groups and studies have made similar recommendations over the years, often leading to little practical change.³¹⁵

The Committee therefore felt it was necessary to include several direct recommendations for change, as follows:

311 INAN, *Evidence*, 29 September 2017, 0920 (Chief R. Donald Maracle).

312 INAN, *Evidence*, 29 September 2017, 0935 (Ryan Lake).

313 INAN, *Evidence*, 29 September 2017, 0940 (Chief Ava Hill).

314 INAN, *Evidence*, 27 September 2017, 0915 (chief Jim Bear).

315 *Brief* presented by the Assembly of First Nations, 27 October 2017.



Recommendation 10

That Indigenous and Northern Affairs Canada broaden the criteria considered when accepting or rejecting a claim for negotiation and implement policies to improve communication and transparency in the assessment phase of the specific claims process, and that an independent body for the review and assessment of specific claims be considered.

Recommendation 11

That Indigenous and Northern Affairs Canada, in partnership with First Nations, reform the specific claims policy and where applicable amend the *Specific Claims Tribunal Act* to:

- **Incorporate First Nations cultures, knowledge and languages in the specific claims policy and process, where possible;**
- **Ensure First Nations are provided with information regarding their claims and rationale for decisions made at all stages of the specific claims process;**
- **Ensure First Nations are involved and appropriately supported in determining the value of their specific claim(s);**
- **Review and broaden the criteria in the financial formula that Indigenous and Northern Affairs Canada uses to determine an appropriate offer of settlement, including a review of the 80/20 rule and increased use of land transfers as compensation;**
- **Expand the eligibility criteria for specific claims to include claims based on the non-fulfilment of treaty rights;**
- **Review the 150 million dollar maximum compensation cap for claims resolved through the Specific Claims Tribunal.**

H. Funding for the research and development of specific claims

The Committee heard that funding for the research and development of specific claims has declined significantly over the past several years. At the same time, witnesses reported a notable increase in the volume of work needed to meet the requirements for specific claim submissions as listed in the minimum standard. Taken together, the

decreased funding and the increase in work prevents some First Nations from submitting specific claims and contributes to significant delays in preparing submissions.

Given that a specific claim submission can take between six months and two years to complete, unstable funding leaves research organizations such as the Treaty and Aboriginal Rights Research Centre of Manitoba uncertain if they will have the financial or human resources to complete claims research efficiently.³¹⁶

It is clear to the Committee that sufficient funding for the research and development of specific claims provides First Nations with the opportunity to participate, thereby contributing to a just and fair process. In addition, investing in the research and development of specific claims may save time and money over the long term as claims may be resolved earlier.

The Committee recognizes that research funding for specific claims is a priority issue under consideration by the Government of Canada and the AFN.³¹⁷ However, the Committee is of the view that INAC does not need to wait until the Joint Technical Working Group on Specific Claims concludes its work to increase funding for the research and development of specific claims. Therefore, the Committee recommends:

Recommendation 12

That Indigenous and Northern Affairs Canada immediately work with First Nations communities and specific claim research organizations to develop a funding framework that provides sufficient funding for the research and development of specific claims and that the department ensure stable, predictable and long-term funding going forward.

I. Treaty Land Entitlement and the Additions to Reserve Process

Following the signing of a Treaty Land Entitlement Settlement Agreement, First Nations can participate in the Additions to Reserve process to add the land to their reserve. The Committee heard that this process is fraught with delays, taking an average of eight years in Manitoba alone. The Committee believes that INAC can take further steps to improve the Treaty Land Entitlement and Additions to Reserve process to minimize delays, and therefore recommends:

316 [Brief](#) presented by The Treaty and Aboriginal Rights Research Centre of Manitoba, Inc., 31 October, 2017.

317 INAC, [Report on the Review of the Specific Claims Tribunal Act](#).



Recommendation 13

That Indigenous and Northern Affairs Canada, with regard to all Treaty Land Entitlement or Additions to Reserve lands, ensure First Nations have access to dispute resolution mechanisms and resources to negotiate and plan with municipalities (land use, urban reserves, road building and service agreements) and third party interests (conversion of land to reserve status).

Recommendation 14

That Indigenous and Northern Affairs Canada increase funding and resources to support environmental assessments, surveys and necessary federal activities to conclude the Additions to Reserve process in a timely manner.

J. Education and training

a. Informing community members and third parties throughout the process

The Committee was concerned to hear that community members may not be informed about discussions during the negotiation of specific claims. As explained by Chief Laforme from the Mississaugas of the New Credit First Nation “you cannot inform your membership, you can’t keep them updated” during the negotiations.³¹⁸ This restricts community leaders’ ability to keep members engaged throughout the process, and may lead to difficulties in ratifying the agreement.

Specific claims and comprehensive land claims may also affect the interests of third parties and it is important that these groups are provided with information about the negotiations as they progress. The Committee recognizes the provisions regarding third parties outlined in the comprehensive and specific claims policies. For comprehensive land claims, the mandate of federal negotiators includes maintaining communication with affected third parties. For specific claims, the policy states that third party interests will be taken into consideration as part of any settlement.

To ensure greater transparency throughout the claims processes, the Committee recommends:

318 INAN, *Evidence*, 29 September 2017, 1050 (Chief Stacey Laforme).

Recommendation 15

That Indigenous and Northern Affairs Canada develop an improved process for educating and engaging third parties and local community members at every stage of a comprehensive or specific claim.

b. Education and training for staff working on claims and all Canadians

The Committee believes that education is an important part of reconciliation, leading to improved relationships between Indigenous peoples, the federal government and all Canadians. Several witnesses highlighted the importance of ensuring that staff working on specific claim files understand the culture, knowledge, protocol and worldviews of Indigenous communities and the context surrounding specific claims.³¹⁹

In terms of comprehensive land claims and self-government agreements, the Behdzi Ahda First Nation noted that government officials should understand who they are working with, given that they make decisions affecting the lives of Indigenous peoples. They further recommended that negotiators should have a mandate to include “cultural competency obligations in land claims and self-government agreements.”³²⁰ The Committee agrees with witnesses, and finds that, if made mandatory, this training could contribute to developing better relationships between Indigenous communities and the federal government.

However, the Committee is of the view that training and education efforts should not be limited to public servants. Education is an important part of reconciliation, as it could encourage the development of relationships between Indigenous and non-Indigenous Canadians. The Committee is encouraged that INAC has information on specific claims and comprehensive land claims publicly available on its website; however we feel that these resources may not be reaching Canadians. To address this concern, the Committee believes that INAC should launch a public education campaign to fill “the gaps between truth and reconciliation” so “the public can better understand why these processes are in place, what we’re trying to do here, what the needs are for supporting the treaty process and comprehensive claims.”³²¹ Therefore, the Committee recommends:

319 INAN, *Evidence*, 25 September 2017, 1140 (Debbie Abbott); INAN, *Evidence*, 29 September 2017, 1050 (Chief Stacey Laforme); INAN, *Evidence*, 27 September 2017, 0925 (Chief Jim Bear).

320 INAN, *Evidence*, 23 October 2017, 0920 (Joseph Kochon).

321 INAN, *Evidence*, 25 September 2017, 1030 (David Schaepe).



Recommendation 16

That Indigenous and Northern Affairs Canada work with the Indigenous communities and organizations to develop a mandatory education and training program for all officials working on specific claims, comprehensive land claims, and self-government agreements; and that Indigenous and Northern Affairs Canada launch a public education campaign to educate all Canadians on the importance of the land claims process in reconciling harms that have resulted throughout Canadian history through the expropriation of traditional land, the unfulfillment of treaty commitments, and a policy of assumed crown sovereignty.

K. United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms a range of collective, political, social, economic, cultural and environmental rights for Indigenous peoples. Witnesses explained that UNDRIP, with rights recognition as a foundation, could be a “standard for creating relationships.”³²² Others suggested that UNDRIP could guide the reform of the comprehensive land claims policy.³²³

Ultimately, the Committee believes that any changes to the claims policies or processes must involve Indigenous peoples and respect Indigenous rights. UNDRIP provides a standard and a guide for the review and reform of these policies and processes to ensure they are more equitable, fair, just and transparent for Indigenous peoples. The Committee therefore recommends that:

Recommendation 17

That the Government of Canada, in implementing the preceding recommendations and proposed initiatives, be guided by the Principles and Minimum Standards set out in the United Nations Declaration on the Rights of Indigenous Peoples.

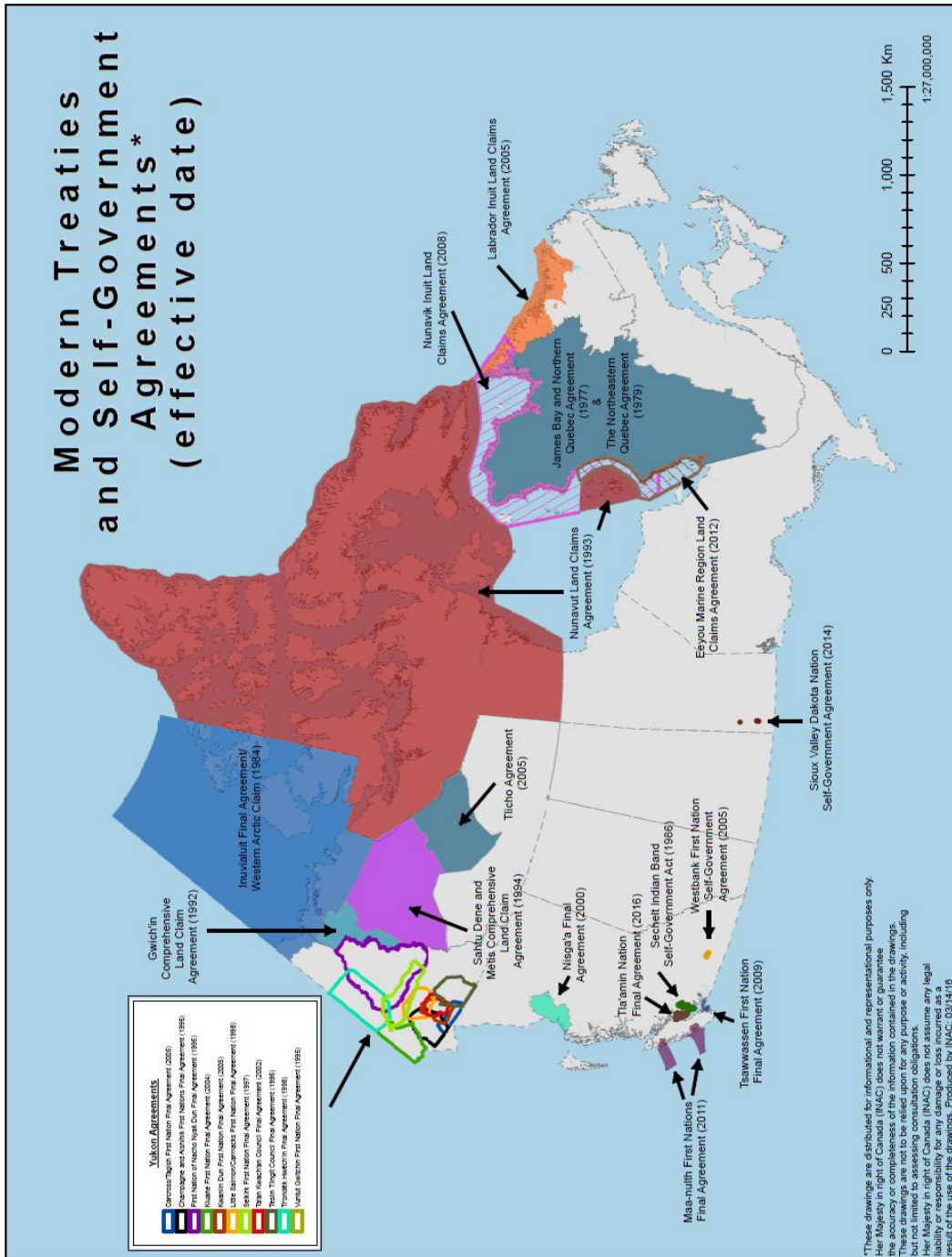
It is clear that the settlement of comprehensive land claims and specific claims provides numerous benefits to Indigenous communities. The comprehensive land claim, specific claim, and self-government processes provide a starting point for the development of relationships and movement towards reconciliation. However, the processes to resolve these claims are difficult for Indigenous communities, many of whom go generations without ever reaching a settlement. This report has proposed practical

322 INAN, [Evidence](#), 25 September 2017, 1110 (David Schaepe).

323 [Brief](#) presented by the Union of British Columbia Indian Chiefs, 26 October 2017; [Brief](#) presented by the Algonquin Nation Secretariat, 26 October 2017.

recommendations to create a just, fair, transparent, and equitable process by reforming policies, reducing the time all parties spend in negotiations, and making the processes more inclusive of Indigenous languages, laws and perspectives. The Committee is hopeful that these recommendations will begin to address the concerns of Indigenous communities, while creating mechanisms for their involvement in the development of policies and processes that affect them.

APPENDIX A: MAP OF MODERN TREATIES AND SELF-GOVERNMENT AGREEMENTS



Source: Indigenous and Northern Affairs Canada, [Map Room](#).

APPENDIX B LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p>Department of Indian Affairs and Northern Development</p> <p>Perry Billingsley, Associate Deputy Minister Treaties and Aboriginal Government</p> <p>Stephen Gagnon, Director General Specific Claims Branch, Treaties and Aboriginal Government</p> <p>Julie Mugford, Senior Director Modern Treaty Implementation Office, Implementation Branch, Treaties and Aboriginal Government</p>	2017/09/19	67
<p>British Columbia Treaty Commission</p> <p>Celeste Haldane, Chief Commissioner</p> <p>Tom Happynook, Commissioner</p>	2017/09/25	69
<p>First Nations of the Maa-nulth Treaty Society</p> <p>Charlie Cootes, President</p> <p>Connie Waddell, Councillor</p> <p>Gary Yabsley, Legal Counsel Ratcliff and Co</p>		
<p>First Nations Summit</p> <p>Cheryl Casimer, Political Executive Member</p> <p>Melissa Louie, Legal and Policy Advisor</p>		
<p>Havlik Metcs Ltd.</p> <p>Morgan Chapman, Research Associate</p>		
<p>Nisga'a Lisims Government</p> <p>Collier Azak, Chief Executive Officer</p> <p>Eva Clayton, President</p> <p>Corinne McKay, Secretary-Treasurer</p> <p>Margaret Rosling, General Counsel</p>		

Organizations and Individuals	Date	Meeting
<p>Nlaka'pamux Nation Tribal Council Debbie Abbott, Executive Director Grand Chief Robert Pasco, Tribal Chair</p>	2017/09/25	69
<p>Sto:lo Xwexwilmexw Treaty Association David Schaepe, Technical Advisor Treaty Negotiating Team Jean Teillet, Chief Negotiator</p>		
<p>Te'mexw Treaty Association Robert Janes, Legal Counsel</p>		
<p>Union of British Columbia Indian Chiefs Judy Wilson, Secretary-Treasurer Jody Woods, Research Director</p>		
<p>Westbank First Nation Christopher Derickson, Councillor</p>		
<p>Assembly of Manitoba Chiefs Grand Chief Arlen Dumas</p>	2017/09/27	70
<p>Athabasca Denesuline Né Né Land Corporation Barry Hunter, Negotiations Advisor Ronald Robillard, Chief Negotiator</p>		
<p>Brokenhead Ojibway Nation Chief Jim Bear Lorie Thompson, Legal counsel</p>		
<p>Ghotlenene K'odtineh Dene Wayne Wysocki</p>		
<p>Manitoba Keewatinowi Okimakanak Inc. Grand Chief Sheila North Wilson</p>		
<p>Manitoba Metis Federation Inc. Jason Madden, Legal Counsel</p>		
<p>Northlands Denesuline First Nation Benji Denechezhe, Chief Negotiator</p>		

Organizations and Individuals	Date	Meeting
Sandy Bay First Nation Chief Lance Roulette	2017/09/27	70
Sayisi Dene First Nation Geoff Bussidor, Chief Negotiator		
Treaty Land Entitlement Committee of Manitoba Inc. Nelson Genaille, President		
Conseil de la nation Atikamekw Grand Chief Constant Awashish	2017/09/28	71
Essipit Innu First Nation Marc Chaloult, Coordinator Treaty and Public Affairs Chief Martin Dufour Band Council		
Mi'kmaw Kina'matnewey Eleanor Bernard, Executive Director		
Chiefs of Ontario Chief Isadore Day, Ontario Regional Chief	2017/09/29	72
Missanabie Cree First Nation Ryan Lake, Legal Counsel		
Mississaugas of the New Credit First Nation Chief Stacey Laforme		
Mohawk Council of Akwesasne Grand Chief Abram Benedict Mohawk Government Phillip White-Cree, Acting Manager Aboriginal Rights and Research Office		
Mohawks of the Bay of Quinte Chief R. Donald Maracle Band No. 38		
Nishnawbe Aski Nation Leah Ballantyne, Chief of Staff		

Organizations and Individuals	Date	Meeting
<p>Nishnawbe Aski Nation</p> <p>Luke Hunter, Research Director Land Rights and Treaty Research</p> <p>Six Nations of the Grand River</p> <p>Chief Ava Hill</p> <p>Philip Monture, Land Rights Consultant</p>	2017/09/29	72
<p>Department of Indian Affairs and Northern Development</p> <p>Stephen Gagnon, Director General Specific Claims Branch, Treaties and Aboriginal Government</p> <p>Heather McLean, Director General Policy Development and Coordination Branch, Treaties and Aboriginal Government</p> <p>Joe Wild, Senior Assistant Deputy Minister Treaties and Aboriginal Government</p> <p>Office of the Auditor General</p> <p>Michael Ferguson, Auditor General of Canada</p> <p>Joe Martire, Principal</p> <p>James McKenzie, Principal</p>	2017/10/17	75
<p>Lesser Slave Lake Indian Regional Council, Treaty and Aboriginal Rights Research Program</p> <p>Morgan Chapman, Research Associate</p> <p>Nunavut Tunngavik Inc.</p> <p>Alastair Campbell, Senior Policy Advisor</p> <p>Aluki Kotierk, President</p> <p>Specific Claims Tribunal Canada</p> <p>Jennifer Hocking, Legal Counsel</p> <p>Harry Slade, Chairperson</p>	2017/10/19	76
<p>Behdzi Ahda" First Nation</p> <p>Chief Wilbert Kochon</p> <p>Joseph Kochon, Chief Negotiator</p>	2017/10/23	77

Organizations and Individuals	Date	Meeting
<p>Deh Gah Got'ie First Nations Sam Gargan, Sub-Chief and Mayor of Fort Providence</p> <p>Dene Nation National Chief Bill Erasmus</p> <p>Government of the Northwest Territories Mike Aumond, Deputy Minister Executive and Indigenous Affairs Robert R. McLeod, Premier</p> <p>Gwich'in Tribal Council Bobbie Jo Greenland-Morgan, Grand Chief and President</p> <p>Inuvialuit Regional Corporation Kate Darling, General Counsel Duane Ningaqsiq Smith, Chair and Chief Executive Officer</p> <p>North Slave Métis Alliance Christopher Devlin, Legal Counsel Bill Enge, President</p> <p>Northwest Territory Métis Nation Jake Heron, Chief Negotiator</p> <p>Sahtu Secretariat Incorporated Ethel Blondin-Andrew, Chairperson</p> <p>Tlicho Government Grand Chief George Mackenzie Bertha Rabesca Zoe, Legal Counsel</p>	2017/10/23	77
<p>Government of Nunavut William MacKay, Deputy Minister Department of Justice Susan Woodley, Aboriginal Affairs Advisor Executive and Intergovernmental Affairs</p> <p>Inuit Tapiriit Kanatami Natan Obed, President</p>	2017/10/24	78

Organizations and Individuals	Date	Meeting
Kitigan Zibi Anishinabeg First Nation Chief Jean-Guy Whiteduck	2017/10/24	78
Naskapi Nation of Kawawachikamach Robert Prévost, Advisor Chief Noah Swappie		
Algonquin Nation Secretariat Peter Di Gangi, Director Policy and Research	2017/10/26	79
As an individual Douglas R. Eyford, Lawyer Eyford Macaulay LLP		
Dehcho First Nations Grand Chief Herb Norwegian		
Mishkosimimiziibiing First Nation Glenn Archie, Head Negotiator Flood Claims Negotiations		
Timiskaming First Nation Chief Wayne McKenzie		
Treaty & Aboriginal Rights Research Centre of Manitoba Inc. Patricia Myran, Assistant Director Cam Stewart, Director		
Wolf Lake First Nation Chief Harry St. Denis		

APPENDIX C LIST OF BRIEFS

Organizations and Individuals

Algonquin Nation Secretariat

Anishinabek Nation

Assembly of First Nations

Behdzi Ahda" First Nation

British Columbia Specific Claims Working Group

British Columbia Treaty Commission

Conseil de la nation Atikamekw

Essipit Innu First Nation

First Nations of the Maa-nulth Treaty Society

First Nations Summit

Ghotlenene K'odtineh Dene

Government of Nunavut

Lesser Slave Lake Indian Regional Council

Organizations and Individuals

Liard First Nation

Manitoba Metis Federation Inc.

Mishkosimimiziibiing First Nation

Naskapi Nation of Kawawachikamach

Nlaka'pamux Nation Tribal Council

North Slave Métis Alliance

Peeling, Albert

Specific Claims Tribunal Canada

Stevenson, Mark L.

Treaty & Aboriginal Rights Research Centre of Manitoba Inc.

Union of British Columbia Indian Chiefs

Westbank First Nation

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 67, 69, 70, 71, 72, 75 to 80, 89, 90, 91 and 96](#)) is tabled.

Respectfully submitted,

Hon. MaryAnn Mihychuk
Chair

Study of Specific Claims and Comprehensive Land Claims Agreements: The Conservative Party of Canada's Dissenting Report

Cathy McLeod, Member of Parliament for Kamloops – Thompson – Cariboo

Kevin Waugh, Member of Parliament for Saskatoon – Grasswood

Arnold Viersen, Member of Parliament for Peace River – Westlock

As the Conservative members of the Standing Committee on Indigenous and Northern Affairs (INAN), we recognize the need to resolve long-standing issues related to specific claims and comprehensive land agreements.

Conservatives believe in reconciliation with Indigenous peoples, that economic opportunity and poverty reduction for Indigenous peoples should be key priorities for the federal government, and that Indigenous peoples should have the right to expect responsible and transparent governance.

Moreover, we know that agreements have significant positive impacts on Indigenous communities. Aluki Kotierk, President of Nunavut Tunngavik Inc., stated on October 19, "...it gave us a sense of hope. Now we have the structure in the agreement that outlines how that needs to be achieved."

However, Canada's processes for comprehensive and specific claims are in need of revision. The Committee heard repeatedly that the procedure can be archaically slow. This has left some communities straining to reach an agreement with the Crown for decades, even multiple generations. Further, the federal government has failed – far too many times – to follow through on its commitments to Indigenous people.

As stated in the House of Commons by MP McLeod on February 14, 2018, "The rights of Indigenous peoples in Canada for too long were ignored, maligned, or bent in the pursuit of other interests, and it is incumbent on all of us to continue moving forward in the spirit of reconciliation."

It is for these reasons that we called for the Committee to study "*comprehensive land claims agreements, also known as 'modern treaties,' and self-government throughout Canada; the current processes being used across Canada and how they are currently being executed; the comparative benefits and challenges of different approaches to negotiations; the outcomes and impacts for Indigenous communities who have signed comprehensive land claims agreements; and that the Committee report its findings to the House of Commons.*"

Our constituents are looking forward to the government's response to important recommendations in the Committee's final report, and in the Official Opposition's dissenting report.

The Committee's final report contains several parts with which we agree, but it also neglects to include some of the serious concerns that were raised. We wholeheartedly agree with the Committee's eighth recommendation, which is stated as follows:

That Indigenous and Northern Affairs Canada develop a tracking system to ensure commitments made by the Government of Canada in comprehensive land claim or specific claim agreements are clearly documented, the progress regularly reviewed, and promptly implemented; and that an independent office be created to monitor implementation.

The Committee heard that the federal government had often failed to follow through on commitments. Agreements must not be allowed to be shelved for years without regular, deliberate action to advance the commitments. We believe that the newly-created Departments of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and Indigenous Services Canada (ISC) must enact a system of consistent checks to ensure the government is following through on its promises. This is vital, not only for Canada's relationship with Indigenous peoples and to the honour of the Crown, but also to the community members that worked for many years to see those promises implemented.

Further, we agree with Recommendation 7, regarding the need to ensure various dispute resolution mechanisms are readily available to First Nations, Metis and Inuit, including binding arbitration and mediation. This step has the potential to expedite the far-too lengthy process and reduce court-incurred costs.

We agree with Recommendation 15:

That Indigenous and Northern Affairs Canada develop an improved process for educating and engaging third parties and local community members at every stage of a comprehensive or specific claim.

We have each heard from Canadians all across the country on this issue. The resolution of comprehensive and specific land claims, while necessary, should not create adverse impacts on private land and small business owners. Conservatives believe that those who may be impacted by agreements should be kept informed throughout negotiations, and have multiple opportunities for their concerns to be heard and addressed.

We note the agreement of Perry Bellegarde, National Chief of the Assembly of First Nations. He stated before INAN on February 23, 2016:

You'd look at everything you can to make peace in the valley... as long as things are done in a respectful way, rights aren't trampled on, aren't put to the side, that people are looked after...

Thus, we advise the addition of a further recommendation:

That, as the Government of Canada resolves claims, they mitigate the effect on third parties when possible, and compensate those affected when necessary.

In addition, we are glad to see the Committee's acknowledgement of the economic benefits of self-governing agreements. As stated in the report:

Many witnesses said there are significant benefits to self-government agreements, including giving Indigenous self-governments more latitude than is possible under the *Indian Act*, and ensuring self-sufficiency and the application of systems of governance and education specific to different nations.

One band, in fact, was even "able to reduce its reliance on federal transfers". These are positive steps that we hope to see advanced for other communities.

Finally, we agree with Recommendation 12, regarding the importance of the *United Nations Declaration on the Rights of Indigenous Peoples* as a guide for implementing the Committee's recommendations. We know that Canada is one of only a few countries in the world where Indigenous and treaty rights are entrenched in our Constitution. It was the former Conservative government that, in 2010, made important first steps for Canada to endorse the aspirations of the UN Declaration on the Rights of Indigenous Peoples in a manner fully consistent with Canada's Constitution and laws.

However, the Conservative members of the Committee have serious concerns with some areas of the final report. First, we are profoundly disappointed that the report primarily contains lofty words and few actionable items. Members heard the plea from Joseph Kochon of Behdzi Ahda First Nation when he testified on October 23, 2017:

We want your committee to produce an action plan, not a report. Our community has a motto: don't talk, just do it. We'd be pleased to lend this motto to your committee.

Jean-Guy Whiteduck, Chief of the Kitigan Zibi Anishinabeg, echoed these remarks the next day on October 24:

We've been hearing a lot of fine speeches and comments made by the Prime Minister and this government, but we need to see some action. We think if there's a will, there's a way, but sometimes the political will is not there.

The final report does not meet this standard. For instance, we are disappointed that it failed to include passionate testimony provided by the Ghotelnene K'odtineh Dene and Athabasca Dene.

As witnesses stated, these communities had negotiated in good faith with the Government of Canada for eighteen years to complete two modern treaty agreements, which cover settlement areas in the Northwest Territories and Nunavut. Through hard work and extensive negotiations, the Denesuline and Inuit are close to reaching final agreements with the governments of Canada and Manitoba. This has been achieved through close cooperation with both Liberal and Conservative administrations, and bringing this to resolution would be in no way paternalistic.

We believe that after 18 years and at great financial cost, it is time to finish these land claims and bring forward appropriate legislation for approval by the House of Commons. As Mr. Wysocki testified to the Committee on September 27, 2017:

Canada's moral obligation to move forward cannot be overlooked... Patience is running out and cynicism is gaining momentum. Disregarding these obligations to move forward is a form of contemporary colonialism. We are asking this committee to advise Parliament that any further delay in concluding the treaty is wrong on legal, political, and moral grounds. Concluding the treaty is simply the right thing to do. We are also asking each and every one of you, as parliamentarians, to take this message back to your party caucuses.

Further, Benji Denechezhe, Chief Negotiator of the Northlands Denesuline First Nation, stated:

I hope you can help us. If we have to beg, so be it. Please, we are asking you to help us get what is rightfully ours, because we've been waiting for justice for a long time. Our people are dying. The people who started this negotiation have both passed on, and we buried one three days ago who was my partner and colleague. As you can see, it is heavy for us at times.

Therefore, in light of the need for practical improvements, we recommend:

That the Government of Canada expedite the resolution of modern treaties with the Athabasca Denesuline and the Ghotelnene K'odtineh Dene, including resolving territorial and provincial issues. These bands have negotiated in good faith with the Government of Canada for 18 years.

Another excluded recommendation focusses on the Treasury Board's Divestiture Process. Robert Janes, Legal Counsel for the Te'mexw Treaty Association, spoke to the Committee on September 24, 2017:

... even with things like the Treasury Board directives, which speak to how federal crown lands should be disposed of, you have to look at it and ask if just a custodial agency should be running that part of the process... To have a process that is just devoid of any meaningful mention of the treaty process is, frankly, insane.

We simply do not understand why the final report failed to include something as practical as the Divestiture Process. We recommend:

That the Government of Canada review and revise the Treasury Board’s Divestiture Process to consider how best to include consultation with, and accommodation for, Indigenous peoples, as upheld by the Supreme Court of Canada.

Another practical recommendation not included in the Committee’s final report was a request for INAC to biannually update Parliament on the progress of improving the specific claims process. The Auditor General’s fall 2016 report, *First Nations Specific Claims*, contains a repeated-promise by Indigenous and Northern Affairs Canada to, “work with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process.”

In his appearance to INAN on October 17, Michael Ferguson stated, “all the departments that we audited presented an action plan to the standing committee on public accounts to address our recommendations. Your committee may wish to ask them for an update on the implementation of their commitments.”

Thus, we recommend:

That Indigenous and Northern Affairs Canada update Canadians biannually on the progress of improving the specific claims process, as promised in the Department’s response to Report 6: *First Nations Specific Claims* in the Auditor General’s fall 2016 reports. Testimony to the Committee indicated that little or no change has been implemented thus far.

Third, given the need to improve the comprehensive and specific claims processes, we are concerned that the Committee’s study was not as robust as it could have been. There were serious gaps, including that not all witnesses who the Committee wanted to hear from were afforded the opportunity. We recommend that INAN ensure the deadline and process for submitting complementary reports are more easily accessible to potential witnesses.

Land claims are of such fundamental significance to First Nations; if many do not feel their voices were heard, the recommendations to the government will lack credibility.

Another gap was the lack of a focus on third party interests, and the absence of witnesses to speak to these matters. While concluding agreements is vital for reconciliation, the interests of private land owners, business operators, farmers, ranchers, hunters and anglers should be heard and protected. We note the BC Cattlemen’s Association recommendation that federal, provincial and territorial governments adopt a policy of avoiding and mitigating adverse impacts on third parties, and the provision of compensation if avoidance and mitigation are not possible.

Fourth, we are disappointed that the Liberal majority did not include references to the government's arbitrary and paternalistic five-year moratorium on off-shore oil and gas development in the Arctic. Despite oft-repeated promises to engage in a nation-to-nation relationship in a respectful manner, witnesses informed the Committee that the Liberals only told them of the moratorium moments before it was announced.

When the Premier of the Northwest Territories, Bob McLeod, was asked what consultation had taken place, his reply was clear: "The chair of the Inuvialuit Regional Corporation and I both found out about it two hours before the moratorium was announced. That was the extent of it."

Further, Nunavut's Deputy Minister for Justice told the Committee on October 24:

It was a source of frustration for our government that a moratorium was implemented with about 20 minutes' notice to the territorial governments. That to us revealed, I think, a lack of understanding, or a lack of knowledge, of the role territorial governments play in governing the north. The federal government implemented that moratorium and did the other things you mentioned without, I would say, recognizing the role the territorial governments should have had in making those decisions. That was disappointing for us. We think there should be more recognition from the federal government of the tripartite nature of governance in the north, including the territorial government.

The Committee heard that these actions had swift economic repercussions: the door was closed on \$2.6 billion of work that was committed for the Beaufort Sea. This prompted Premier McLeod to issue a "red alert" for economic development in the north.

In the same vein, the Liberal government evoked a top-down approach to cancel the Northern Gateway pipeline proposal – without consulting First Nations who stood to benefit from more than \$2 billion directly from the project. As quoted in the final report from the Committee, "Mr. Derickson said it would be beneficial to develop a new fiscal relationship, including revenue-sharing agreements." Northern Gateway was one such project, where thirty-one First Nations had signed on to be equity partners. They were profoundly disappointed by the decision from the Liberal Cabinet, which they see as a lost opportunity for jobs, education and long-term benefits for band members.

Therefore, we recommend:

That the Government of Canada reverse paternalistic decisions to remove economic opportunity for Indigenous communities until such time as proper consultations have been held with impacted Indigenous communities and the territorial governments. This includes the cancellation of the Northern Gateway project and the five-year moratorium on off-shore oil and gas development in Canada's Arctic.

Fifth, the Conservative Members of INAN have concerns with the Committee's call for the complete forgiveness of outstanding loans. This is contained in the following recommendations from the final report:

Recommendation 4: That the Government of Canada work in partnership with First Nations to reform the funding model for the specific claims process to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven.

Recommendation 5: That the Government of Canada work in partnership with Indigenous peoples to reform the funding model for the comprehensive claims process to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven.

Recommendation 6: That the Government of Canada work in partnership with Indigenous peoples to reform the funding model for the Treaty Land Entitlement and Additions to Reserve processes to convert the current structure of repayable loans to one of non-repayable grants. As part of this funding reform, all existing outstanding loans should be forgiven.

We agree that loans have often "proved to be a political and economic hardship"; however, we continue to believe that a combination of loans and grants best incentivizes negotiators to advance and complete negotiations. The alternative would deny First Nations the benefits they would receive from a comprehensive agreement.

Other questions remain: would the federal government make the final decision on a loans limit, thus further impeding the process toward self-governance? Would loan forgiveness be applied retroactively, to outstanding loans, or strictly to future agreements?

We are in agreement with the Committee's report that the current system is in need of improvement, and that government should consider a degree of loan forgiveness; however, the complete forgiveness of loans for the purpose of negotiations is not the best path forward. Rather, consideration should be given to Douglas Eyford's suggestion for a series of loans to be provided at defined stages in the negotiations. When he testified to the Committee on October 26, 2017, Mr. Eyford stated:

The recommendation I made was that Canada should identify a process to fund negotiations going forward. What I recommended was something that is similar to the tariff process in civil litigation. The government says it will provide them with up to x number of dollars to get through various stages of the process, instead of having an open chequebook saying that it will underwrite whatever costs they take. It's up to the First Nations communities in those circumstances to reconcile what kinds of experts, or lawyers, or accountants, or other third

party service providers they are going to retain, and how they're going to pay those persons if the cost exceeds the amount of the tariff.

On his suggestion, we recommend:

That Indigenous and Northern Affairs Canada revise the funding formula for Comprehensive Land Claims to incentivize progress; and consider a combination of grants and loans at defined stages of the process.

In closing, Conservative Members of the Standing Committee on Indigenous and Northern Affairs recognize the immense benefits for Indigenous communities in concluding specific claims and comprehensive agreements. There are serious issues with the current processes that require deliberate attention, especially the repeated failure of the federal government to follow through on its commitments. Only the rare witness called for the end to these procedures; rather, the vast majority urged their immediate revision.

We are concerned that the Committee's final report contains many lofty words and few actionable items; that important testimony and practical recommendations were not included; and that the Committee's call for complete loan forgiveness lacks sufficient consideration. We urge the federal government to heed these recommendations as all Canadians pursue long-term reconciliation with Indigenous peoples.

List of Recommendations:

- 1) That, as the Government of Canada resolves claims, they mitigate the effect on third parties when possible, and compensate those affected when necessary.
- 2) That the Government of Canada expedite the resolution of modern treaties with the Athabasca Denesuline and the Ghotelnene K'odtineh Dene, including resolving territorial and provincial issues. These bands have negotiated in good faith with the Government of Canada for 18 years.
- 3) That the Government of Canada review and revise the Treasury Board's Divestiture Process to consider how best to include consultation with, and accommodation for, Indigenous peoples, as upheld by the Supreme Court of Canada.
- 4) That Indigenous and Northern Affairs Canada update Canadians biannually on the progress of improving the specific claims process, as promised in the Department's response to *Report 6: First Nations Specific Claims* in the Auditor General's fall 2016 reports. Testimony to the Committee indicated that little or no change has been implemented thus far.
- 5) That the Government of Canada reverse paternalistic decisions to remove economic opportunity for Indigenous communities until such time as proper

consultations have been held with impacted Indigenous communities and the territorial governments. This includes the cancellation of the Northern Gateway project and the five-year moratorium on off-shore oil and gas development in Canada's Arctic.

- 6) That Indigenous and Northern Affairs Canada revise the funding formula for Comprehensive Land Claims to incentivize progress; and consider a combination of grants and loans at defined stages of the process.

